CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 111

HOMER C. PRICE, PETITIONER,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON PETITION OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 4, 1947.

CERTIORARI GRANTED JUNE 23, 1947.

No. 11334

United States
Circuit Court of Appeals
For the Ninth Circuit

HOMER C. PRICE,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco 7-31-47—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HOMER C. PRICE,
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California,
In Propria Personam.

FRANK J. HENNESSY,
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Attorneys for Appellee.

On Appeal from United States District Court, Northern District of California, Southern Division.

Decision by Hon. Michael J. Roche.

In the Southern Division of the United States District Court for the Northern District of California.

No. 25537-R

In the Matter of the Application of

HOMER C. PRICE,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

In re: Application for leave to file Petition for Writ of Habeas Corpus, and Proceed in Forma Pauperis.

Comes now Homer C. Price, petitioner in the within matter and states that he is a citizen of the United States by birth and is of legal age:

That he is in the custody of the United States and is being confined in the United States Penitentiary on the Island of Alcatraz, California, and within the jurisdiction of this Honorable Court:

That he is the petitioner in the above-entitled application for writ of habeas corpus and that he is entitled to commence and maintain the same.

That the petitioner-affiant believes himself entitled to the redress sought to be obtained by said application, that the [1*] nature of said application is the determination of the scope and extent of affiant's

* Page numbering appearing at foot of page of original certified Transcript of Record.

right to be secure from being placed upon trial for a crime not charged in the indictment; and to be secure in not having a witness subpoenaed to prove a collateral crime unrelated to the crime charged; and be secure in not having a collateral crime, that has never been charged against affiant, proved and submitted to the jury for their consideration; and to be secure in having the indictment charge the offense by "conjunctive," and not by "disjunctive," and to be secure in having the jury find the guilt, or not guilty, upon separate and distinct offenses; and to be secure in having each indictment, charge only one crime; and to be secure in having a fair and impartial trial, and due process of law; that affiant is without funds and unable to pay the costs of said application or petition on to give security for the same; that there is no person interested by contract or otherwise in said application or entitled to share in any relief thereunder who is able to pay or secure said costs; that this application and affidavit is made for the purpose of availing affiant of the rights and privileges in such case provided by Section 832 of title 28 U.S.C., Sec. 832.

Wherefore, affiant prays that he may have leave to prosecute said Petition for write of habeas corpus in forma pauperis without costs of fee pursuant to said Statute, supra. [2]

Respectfully submitted,

/s/ HOMER C. PRICE,
Petitioner.

State of California,
County of San Francisco—ss.

Homer C. Price, being first duly sworn, deposes and says:

That he is the petitioner in the within action; that he has read the within application for leave to file petition and proceed in forma pauperis, and knows the contents thereof; that the statements made herein are true of his own knowledge.

/s/ HOMER C. PRICE,
Affiant.

....., Register Number 459 AZ, has on deposit in the Prisoners' Trust Fund, the sum of $2.39.

Subscribed and sworn to before me this 2nd day of January, 1946.

[Seal] /s/ E. J. MILLER,

Associate Warden, United States Penitentiary, Alcatraz, California.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Homer C. Price is a citizen of the United States.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Title of District Court and Cause.]

PETITION FOR WRIT OF HABEAS CORPUS

To the United States District Court, Northern District of California:

The Petition of Homer C. Price respectfully shows:

1. That he is now imprisoned and restrained of his liberty by James A. Johnston, Warden, in United States Penitentiary, Alcatraz, California.

2. That the cause or pretense of such imprisonment and restraint, according to the best knowledge and belief of your petitioner, is the indictment, judgment, verdict, copies of which are hereto annexed.

3. That said imprisonment and restraint are illegal and their illegality consists in the following, among other things, to-wit:

4. That petitioner was convicted by a general verdict of the jury, upon an indictment drawn in four counts, the first count charges two separate and distinct offenses. (P. 7) the first count charges the offense of "entering the bank with intent to commit a felony, * * *, the second offense charged in the same count being a separate and distinct offense, to wit: "and steal the money therein, the sum of $3,829.06."

5. The fourth count of the indictment charges the offense of: "entering the bank with intent to commit a felony," * * *, the second, third, and

fourth offenses charged in this same count, [4] are three aggravating circumstances charging a single offense; but are a separate and distinct offense from that of the first offense: (P. 8-9).

6. The court confused the jury as to the actual basis of the indictment, by giving the impression that the defendant was indicted for the crime of perjury, before a Notary Public of the State of Michigan at Lansing, Michigan, and subpoenaed the Notary and inquired into the collateral crime, unconnected with the crime charged. See exhibit (a), and submitted it to the jury for a finding, as claimed by the evidence presented by the government; denying defendant the right to be informed of the nature and cause of the accusation; and a change in the indictment by the court; see exhibit (E).

7. That the court invaded the province of the jury, by itself determining upon what clause of the Statute the general verdict rested.

8. That the fourth count of the indictment does not charge a crime, and the court did not have jurisdiction as there could not be any evidence submitted to prove the crime as follows: in that the clause of the statute defining the offense of forcing a person to accompany them; is in the disjunctive and the pleader has not connected the offense by the conjunctive, therefore is void.

9. That the court upon a general verdict of the jury, upon [5] multiple counts of the indictment

charging separate and distinct offenses; passed a general Sentence (P. 10-11), the first count of the indictment charging two separate and distinct offenses (P. 7); the fourth count charges two separate and distinct offenses, and three aggravating circumstances, charging a single offense. (P. 8-9).

16. That for the above causes, petitioner has been denied a fair and impartial trial, and denied due process of law.

Wherefore your petitioner prays that a writ of habeas corpus issue, directed to the said James A. Johnston, commanding him to have the body of Homer C. Price, together with the cause of such imprisonment and restraint, forthwith before the court or officer granting said writ.

Respectfully submitted,

HOMER C. PRICE,
Petitioner Propria Persona,
459-AZ, Alcatraz, California.

Dated January 2, 1946.

United States of America,
Northern District of California—ss.

Homer C. Price, being duly sworn, deposes and says:

That he has drafted the foregoing application and knows the contents thereof, and that the same is in all respects true.

Sworn to before me this 2nd day of January, 1946. [6]

[Seal] /s/ E. J. MILLER,

Associate Warden, United States Penitentiary Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths. [7]

EXHIBIT A

DIRECT EXAMINATION OF THE WITNESS, WILLIAM H. BECK TAKEN ON APRIL 26, 1938.

Direct Examination

By Mr. Babcock:

Q. Where do you live, Mr. Beck?

A. 1120 Jerome Street, Lansing, Michigan.

Q. Are you in business in Lansing?

A. I am.

Q. What is your business?

A. I have a sporting goods store.

Q. I will show you a document marked Exhibit 15, and ask you to examine it, and see if you can tell me if you recognize any names on there?

A. I do.

Q. Whose name?

A. Homer C. Price, and my own.

Q. In what capacity is your own name on there?

A. As a Notary.

Q. Are you a Notary Public? A. I am.

Q. Commissioned by the Governor of the State of Michigan? A. I am.

Q. And were you such on the 10th of November, 1937? A. I was.

Q. Whether or not you acted in that capacity in connection with exhibit 15? [8] A. I did.

Q. At that time, what was the condition of that document, exhibit 15, as to whether or not the blanks were filled in or not?

A. The blank was all filled, excepting the signature of Homer C. Price and my own.

Q. And when was the signature of Homer C. Price put on there?

A. On the 10th day of November, 1937.

Q. In your presence? A. It was.

Q. And what did you say to Homer C. Price at that time?

A. I asked him to sign the document, and then administered the oath.

Q. In administering the oath, what did you say to him?

A. Asked him to raise his right hand and swear that the affidavit that he had signed was the truth, the whole truth and nothing but the truth, "So help me God."

Mr. Babcock: You may cross-examine. [9]

EXHIBIT B

Vio: Title 12, Sec. 588 B (a), (b) and Sec. 588c U.S.C. Banking Act of 1935.

United States of America
In the District Court of the United States
For the Eastern District of Michigan
Southern Division

Eastern District of Michigan,
Southern Division—ss.

The Grand Jurors of the United States of America, empanelled and sworn to inquire in and for the body of the Southern Division of the Eastern District of Michigan, upon their oaths present: That on or about the 7th day of January, A.D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court,

Homer C. Price
and
John Simunov, alias
John Szekeres, alias
John Simuno, alias
John Czekeres, alias
John Ray, alias
John Simino, alias
John Semuny, alias
John Czekerec,

said Homer C. Price being late of the City of Lansing, Michigan, and hereinafter referred to as defendants, did, enter a bank, to-wit: The Metamora

State Savings Bank, a bank in the village of Metamora, Michigan, with intent to commit in such bank a felony or larceny, to-wit: to take, rob, and steal the money therein in the care, custody, control, management, and possession [10] of said bank, and belonging to said bank, said money being, to-wit: In the sum of $3,829.06, and said bank being an insured bank in the Federal Deposit Insurance Corporation; contrary to form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

SECOND COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendant Homer C. Price, late of the City of Lansing, Michigan, and the said defendant John Simunov, alias, John Szekeres, alias John Simuno, alias John Czekerec, late of the County of Wayne and State of Michigan, on or about the 7th day of January, A.D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, by force and violence, and by putting in fear, unlawfully willfully, knowingly, and feloniously, rob, steal, and take from the presence of Fred T. Donner, an officer and employee of the Metamora State Savings Bank, a banking corporation organized and doing business under the laws of the State of Michigan, and an insured bank in the Federal Deposit Insurance Corporation, certain monies, to-wit: the sum

of $3,829.06, lawful money of the United States of America, the exact denominations of the certificates, currency and coin comprising the sum aforesaid being to these Grand Jurors unknown, which said sum of money, at the time *time* it [11] was so robbed, stolen and taken by the defendants as aforesaid, belonged to and was in the care, custody, control, management and possession of a certain bank, to-wit: The Metamora State Savings Bank, an insured bank in the Federal Deposit Insurance Corporation; contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendant Homer C. Price, late of the City of Lansing, Michigan, and the said defendant John Simunov, alias John Szekeres, alias John Simuno, alias John Czekeres, alias John Ray, alias John Simino, alias John Semuny, alias John Czekerec, late of the County of Wayne, State of Michigan, on or about the 7th day of January, A.D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the Second Count hereof, to-wit: by force and violence, and by putting in fear, unlawfully, willfully, knowingly, and feloniously rob, steal and take from the presence of Fred T. Donner, money in the care, custody, con-

trol, management and possession of the Metamora State Savings Bank, an insured bank in the Federal Deposit Insurance Corporation, assault, and put in jeopardy the life of Fred T. Donner, and other persons [12] to these Grand Jurors unknown, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

FOURTH COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendant Homer C. Price, late of the City of Lansing, Michigan, and the said defendant John Simunov, alias John Szekeres, alias John Simuno, alias John Czekeres, alias John Ray, alias John Simino, alias John Semuny, alias John Czekerec, late of the County of Wayne, State of Michigan, on or about the 7th day of January, A.D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing the offenses hereinbefore described in the First, Second and Third Counts hereof, to-wit: (a) entering the Metamora State Savings Bank, an insured bank in the Federal Deposit Insurance Corporation, with intent to commit a felony or larceny therein; (b) robbing, stealing and taking from the presence of Fred T. Donner money in the care, custody, control, management and possession of the Metamora State Savings

Bank, an insured bank in the Federal Deposit Insurance Corporation; and (c) while committing the offenses immediately hereinbefore described, assaulting, and putting in jeopardy the life of Fred T. Donner, by the use of dangerous weapons; or in avoiding or attempting to avoid [13] apprehension for the commission of such offenses, force a person, to-wit: Fred T. Donner, to accompany them without the consent of said Fred T. Donner; contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

JOHN C. LEHR,
United States Attorney.

JOHN W. BABCOCK,
Assistant U. S. Attorney,
Eastern District of Michigan.

A true bill:

LOUIS M. CARLETON,
Foreman.

[Endorsed]: Filed Feb. 15, 1938. [14]

EXHIBIT C

VERDICT

April 29, 1938.

At a Session of the District Court of the United States for the Eastern District of Michigan, con-

tinued and held pursuant to adjournment at the District Court Room, in the City of Detroit, in said District, on Friday the twenty-sixth day of April, in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable Edward J. Moinet, United States District Judge;

The Honorable Ernest A. O'Brien, United States District Judge, and

The Honorable Arthur F. Lederle, United States District Judge.

April 29, 1938.

UNITED STATES OF AMERICA,

vs.

HOMER C. PRICE and JOHN SIMUNOV, alias JOHN SZEKERES, alias JOHN SIMUNO, alias JOHN CZEKERES, alias JOHN RAY, alias JOHN SIMINO, alias JOHN SEMUNY, alias JOHN CZEKEREC.

INDICTMENT FOR VIOLATION TITLE 12, SEC. 588 B (a) (b) AND SEC. 588C U.S.C. BANKING ACT OF 1935

In this cause the jurors heretofore empaneled and sworn come into Court again and sit together and the Judge in open court, opens the sealed verdict of the jurors heretofore returned, which sealed verdict is by the Court read aloud and discloses that the jury finds that the defendants Homer C.

Price and John Simunov, alias John Szekeres, alias John Simuno, alias John Czekeres, alias John Ray, alias John Simino, alias John Semuny, alias John Czekerec, guilty of the charges in said indictment contained.

Thereupon it is ordered that sentence of said defendants be deferred without date, and said defendants remanded to the custody of the United States Marshal, to await sentence.

EDWARD J. MOINET,
U. S. District Judge.

SENTENCE

At a Session of the United States District Court for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room in the City of Detroit in said District on Saturday, the fourteenth day of May, A.D. 1938.

Present:

The Honorable Edward J. Moinet, United States District Judge. [16]

[Title of Cause.]

Indictment for Vio: Title 12, Sec. 588 B (a), (b), and Sec. 588 C. U.S.C. Banking Act of 1935. (Unlawfully entering a Bank with intent to rob; Robbing a Bank; Putting in jeopardy the life of a person with the use of dangerous weapons, and Kidnapping).

The defendant Homer C. Price, being present in Court and having heretofore been found guilty of

the charges in said indictment contained and now being placed at the Bar of the Court for sentence, and duly inquired of by the Court what he had to say why sentence should not be imposed upon him, and the Court having fully heard and considered all that said defendant had to say in that behalf, thereupon the Court does now sentence the said defendant, Homer C. Price to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary for and during the term of and period of sixty-five (65) years at hard labor, beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention; to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention, for violation of Title 12, Sec. 588 B (a), (b) and Sec. 588 C U.S.C. Banking Act of 1935.

/s/ EDWARD J. MOINET,
U. S. District Judge.

Approved as to form:

JOHN C. LEHR,
U. S. Attorney.

By JOHN W. BABCOCK,
Asst. U. S. Attorney.

[Endorsed]: Filed May 14, 1938. [18]

EXHIBIT E

[Title of District Court and Cause.]

Hearing before Honorable Edward J. Moinet, District Judge, and a jury, commencing on April 19, 1938, charge of the court.

Now, briefly, and to aid you somewhat in your deliberations, so that you may see the issues that are here for your determination, some testimony has been given here as to the evidence of Price, in reference to his application for a permit to carry a pistol.

The government claims in that respect, that in his application, he swore falsely.

The government claims that its testimony shows that Price presented this application to this Notary in Lansing, and he was a notary and he administered the oath.

If you find that Price sworn to that knowingly, then that would be swearing to something that is not true.

(By the) ASSOCIATED COURT REPORTERS,
1358-1362 National Bank Bldg., Detroit, Michigan.

[Endorsed]: Filed Jan. 7, 1946. [19]

District Court of the United States
Northern District of California

No. 25537-R

HOMER C. PRICE,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that James A. Johnston, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 21st day of January, 1946, at the hour of 10 o'clock a.m., of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated January 8th, 1946.

MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Jan. 8, 1946. [20]

[Title of District Court and Cause.]

AMENDMENT TO THE APPLICATION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner and amends his application for writ of habeas corpus by inserting the following paragraph on page 4 of said application, marked as paragraph 10:

10. That the government knowingly employed false testimony on the trial, to obtain the conviction.

HOMER C. PRICE,
Petitioner Propria Persona.

Dated January 14, 1946.

[Endorsed]: Filed Jan. 15, 1946. [21]

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now James A. Johnston, Warden of the United States Penitentiary at Alcatraz Island, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the prisoner," on whose behalf the petition for writ of habeas corpus was filed, is detained by respondent James A. Johnston, as Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence of the District

Court of the United States for the Western District of Michigan, Southern Division, in case number 24629, made and entered on May 14, 1938, and transfer order issued at Washington, D.C., on July 2, 1938, signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice, ordering the transfer of the petitioner from the Penitentiary at Leavenworth, Kansas, to the United States Penitentiary at Alcatraz Island, California;

II.

That this is the fourth petition for writ of habeas corpus filed by the petitioner herein, a prior petition in [22] case number 23268-W, a prior petition in case number 23721-R and a prior petition in case number 25040-S having been denied by this Court;

III.

That the entire record in said case number 23268-W, the entire record in said case number 23721-R and the entire record in said case number 25040-S are hereby referred to and incorporated herein as though set forth in full.

Wherefore respondent prays that this petition for writ of habeas corpus be denied.

Dated January 21, 1946.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Respondent.

MEMORANDUM OF POINTS AND AUTHORITIES

This is the fourth petition for writ of habeas corpus filed by the petitioner herein.

In denying petitioner's application for writ of habeas corpus in case number 25040-S, his Honor, United States District Judge A. F. St. Sure on August 22, 1945, filed the following memorandum and order:

"Petitioner seeks his release from Alcatraz Penitentiary on this third petition for write of habeas corpus. The first, No. 23268-W, was heard and denied on January 14, 1941, by Judge Martin I. Welsh. On appeal, with the entire record of the matter before it, and after lengthy discussion, the Judgment of the District Court was affirmed. Price v. Johnston, 125 F. (2d) 806. Certiorari was denied by the United States Supreme Court, 316 U.S. 677. The Second petition, No. 23721-R, was heard by Judge Michael J. Roche, petitioner being present in court, and was denied by Judge Roche on September 8, 1943. On appeal the order of the District Court was affirmed. Price v. Johnston, 144 F. (2d) 260.

Petitioner alleges 'that the questions now raised was not raised in the prior petitions No. 23268-W and 10671-R.' However, these matters were known to petitioner when he filed the petitions in 23268-W and 23721-R. If petitioner intended to rely on these matters he should have urged them in 23268-W. 'To reserve them for use in a later proceeding

"was to make abusive use of the write of habeas corpus".' Swihart v. Johnston, United States Circuit Court of Appeals for the Ninth Circuit, decided August 6, 1945.

Since upon the face of the petition petitioner is not entitled to the writ, Walker v. Johnston, 312 U.S. 275, 284, it is therefore [24]

Ordered the petition for writ of habeas corpus is hereby denied.

Dated August 22, 1945."

Judge St. Sure likewise entered an order on November 23, 1945, denying permission to petitioner to appeal in forma pauperis.

Respondent, in reliance on the decision of Judge St. Sure and the authorities which he cites, respectfully urges that the petition for writ of habeas corpus should be denied and the order to show cause, heretofore issued, discharged.

[Endorsed]: Filed Jan. 21, 1946. [25]

District Court of the United States, Northern District of California, Southern Division

No. 25537-R Civil

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room

thereof, in the City and County of San Francisco, on Monday, the 21st day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Michael J. Roche, District Judge.

Homer C. Price

vs.

James A. Johnston, Warden, Etc.

This case came on regularly this day for hearing on the order to show cause. On motion of Daniel Deasy, Esq., Assistant U. S. Attorney, it is Ordered that the petitioner may have two weeks to file a traverse to the respondent's return to the order to show cause, and that said matter be continued to February 4, 1946, for further hearing. [26]

[Title of District Court and Cause.]

TRAVERSE TO RESPONDENT'S ANSWER TO AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS:

Comes now Homer C. Price, petitioner in the within matter, and for his traverse to respondent's answer to amended application for writ of habeas corpus respectfully shows:

1.

That the person hereinafter called "the Respond-

ent," on whose behalf the "Return To Order To Show Cause" was filed, concedes the facts upon which the petitioner is being detained, by virtue of the judgment and sentence of the District Court of the United States for the Eastern District of Michigan in Case No. 24629, made and entered on May 14, 1938.

2.

That this is the fourth petition for writ of habeas corpus filed by the petitioner herein; a prior petition in Case No. 23268-W did not contain these questions; a prior petition in Case No. 23721-R did not contain these questions; and a prior petition in Case No. 25040-S did not contain some of these points, but the writ was denied—not upon the merits of the questions raised, but upon the abuse of the Writ of Habeas Corpus Statute by a subsequent petition.

3.

The Respondent in paragraph 3, P. 2, line 13, incorporates the entire record in the three prior petitions into the present petition, which is nothing more than an effort to prejudice [27] the petitioner by incorporating matters which have no application to the questions involved and should be stricken out.

4.

That petitioner was in fact tried and convicted upon separate and distinct offenses, consolidated for trial, by a general verdict of the Jury, without specifying upon which clause of the Statute the general verdict rested, and there being a crime charged in the crime involved.

5.

That the petitioner was in fact tried and convicted of a common law crime by a change of the indictment of the court, and therefore not informing the petitioner of the nature and cause of the accusation.

6.

That the trial court did in fact invade the province of the Jury, by itself determining upon what clause of the Statute the general verdict rested for the purpose of sentence.

7.

That the trial court did in fact pass a general sentence, upon a general verdict of the Jury, upon multiple counts of the indictment, charging separate and distinct offenses, and the common law crime charged.

8.

That petitioner did not in fact have a fair and impartial trial before the trial court, and in fact was denied due process of law. [28]

Petitioner incorporates herein each and every allegation made by him in his application and amended application for writ of habeas corpus.

Wherefore, petitioner prays that a writ of habeas corpus issue and that the Respondent be ordered to produce the body of petitioner before this Honorable Court, in order that he may prove his allega-

tions and points and be discharged from custody, as law and justice require.

Dated: January 29, 1946.

HOMER C. PRICE,
Petitioner in Propria Persona.

State of California,
City and County of San Francisco—ss.

Homer C. Price, being first duly sworn, deposes and says:

That he is the petitioner in the within action; that he has read the within traverse to answer to amended application for writ of habeas corpus and knows the contents thereof;

That the statements made herein are true of his own knowledge.

HOMER C. PRICE,
Petitioner in Propria Persona.

Subscribed and sworn to before me this 29th day of January, 1946.

[Seal] /s/ E. J. MILLER,
Associate Warden, United States Penitentiary, Alcatraz, California.

Records at U.S. Penitentiary, Alcatraz, California, indicate that Homer C. Price is a citizen of the United States.

Warden-Asociate Warden authorized by the Act of February 11, 1938, to administer oaths. [29]

MEMORANDUM OF POINTS AND AUTHORITIES

The Respondent, in his memorandum of authorities, strongly relies upon the decision of the Honorable Judge St. Sure in Case No. 25040-S to have this petition denied, as being an abuse of the use of Habeas Corpus Statute, by filing subsequent petition for a writ of habeas Corpus, on points that have never been raised, as well as points that have been raised but not decided. The decision so relied upon is as follows, to-wit:

"Petitioner alleges that the questions now raised were not raised in the prior petitions Nos: 23268-W and 10671-R. However, these matters were known to petitioner when he filed the petitions in 23268-W and 23721-R. If petitioner intended to rely on these matters, he should have urged them in 23268-W. To reserve them for use in a later proceeding 'was to make abusive use of the writ of habeas corpus,' Swihart v. Johnston, United States Circuit Court of Appeals for the Ninth Circuit, decided August 6, 1945. Since upon the face of the petition, petitioner is not entitled to the writ, Walker v. Johnston, 312 U.S. 275, 284, it is therefore ordered:

The Petition for Writ of Habeas Corpus is hereby denied.

Dated August 22, 1945."

It is to be noted that the sworn officer of the Court, to see that justice be done, is trying to mislead this Honorable Court as to the law of pro-

cedure in habeas corpus cases by citing the above decision, when, in fact, said District Attorney knows that the above decision is not the law of procedure in habeas corpus cases, and in this Circuit especially, it is to be noted that said Respondent, in his [30] memorandum of points and authorities, did not mention or cite the case that corrects the above ruling of the Honorable Judge St. Sure in denying the petition in 25040-S:

Petitioner in reliance on the decision of U.S. v. Hecht, 48 F. 2d 90; and U.S. v. Mathies, 12 F. 2d 787; Ex Parte Kaine, 14 F. Cas. No. 7597; U.S. v. Matolow, 10 F. 2d 657; and the recent decision in the United States Circuit Court of Appeals for the Ninth Circuit as follows:

Keer v. Squire, 151 F. 2d 308; December 3, 1945: P-310. However, disposition of this present position is a clear illustration of the value of the doctrine that in habeas corpus proceedings the adjudication of a prior petition for release from imprisonment for the same crime, does not make res judicata any matter there decided, much less make adjudicated all the rights to release which could have been, but were not, presented in that prior petition. Waley v. Johnston, 316 U.S. 101, 105, 62 S. Ct. 964, 46 L. Ed. 1302.

Petitioner respectfully urges that the petition for writ of habeas corpus should be issued, and an order to Respondent issued to produce the petitioner in court, in order that he may prove the allegations

set forth in the petition, and amended petition, as law and justice require, and that the petitioner then be discharged.

Dated: January 29, 1946.

Respectfully submitted,

HOMER C. PRICE,
Petitioner in Propria Persona.

[Endorsed]: Filed Jan. 31, 1946. [31]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT

It Is Ordered that the petition for writ of habeas corpus herein filed be and the same is hereby Denied and the order to show cause heretofore issued be, and the same is hereby discharged.

Dated: February 25, 1946.

MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Feb. 25, 1946. [32]

[Title of District Court and Cause.]

AFFIDAVIT FOR LEAVE TO FILE NOTICE OF APPEAL AND PROCEED IN FORMA PAUPERIS:

United States of America,
State of California,
County of San Francisco—ss.

To the Honorable District Judge Michael J. Roche of the United States District Court for the Northern District of California.

Comes now the appellant Homer C. Price, and being first duly sworn, deposes and says:

That he is in the custody of the above-named appellee, and is being confined in the United States Penitentiary at Alcatraz, California.

That he is the appellant in the foregoing Petition for leave to proceed on appeal in forma pauperis, from the order denying petition for writ of habeas corpus, No. 25,537-R filed Feb. 25, 1946.

That appellant believes himself entitled to the redress sought to be obtained by said petition, that the nature of said petition and appeal, is the determination of the scope and extent of appellant's right, to have a review in the Circuit Court of Appeals, of the order denying the petition for writ of habeas corpus, on the following allegations, to-wit: [33]

1. That the trial court consolidated separate and distinct offenses, in one indictment, and the court by implication read into the indictment one additional crime, and submitted all to the jury in the

charge of the court, and the verdict of the jury, was a general verdict, which is void:

2. That the trial court amended the indictment by implication to include the crime of perjury, subpoenaed a witness to prove the collateral crime, and submitted it to the jury, along with the crimes layed in the indictment, "a change of the indictment, by the court, deprives the court of the power of proceeding to try the accused."

3. Where verdict of jury is general so that a reviewing court cannot determine that it did not rest on an invalid constitutional ground on which the case was submitted to the jury, the conviction cannot be sustained, as it is in violation of the constitution.

4. That the trial court passed a general sentence, upon multiple counts of an indictment, and the collateral crime, included by the court, which are separate and distinct offenses, and the court has invaded the province of the jury by its self determining upon what clause of the statute, or crimes the general verdict rested;

5. That the government knowingly employed false testimony on the trial, to obtain the conviction. [34]

6. That the government takes the view that the prior judgments, as to matters which were adjudged in these cases, or which could have been adjudged in those cases; or which could have been adjudged "if raised" are Res Judicata in a subsequent Petition for the writ of habeas corpus;

That appellant is without funds and unable to pay the costs of said appeal, or to give security for same: that there is no person interested by contract or otherwise in said Petition, and appeal, who is able to secure the costs.

That this Petition and affidavit, is made for the purpose of availing appellant of the rights and privileges in such case provided by U.S.C.A. Title 28, section 832:

Wherefore: appellant prays that he may have leave to prosecute said Petition and appeal in forma pauperis without costs or fee pursuant to said statute.

Dated: March 23, 1946.

Respectfully submitted,

HOMER C. PRICE,
Appellant Propria Persona.

Subscribed and sworn to before me this 23rd day of March, 1946.

[Seal] E. J. MILLER,
Associate Warden, United States Penitentiary,
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Homer C. Price is a citizen of the United States.

[Endorsed]: Filed Mar. 28, 1946. [35]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

It is hereby Ordered that Homer C. Price be and he is hereby allowed to appeal to the United States Circuit Court of Appeals for the Ninth Circuit in Forma Pauperis.

March 28th, 1946.

MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Mar. 28, 1946.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Homer C. Price, appellant above named, hereby appeals to the circuit court of appeals for the ninth judicial circuit, from the order denying appellants Petition for a writ of habeas corpus, discharging the order to show cause, theretofore made in said proceedings on the 25th day of February, 1946:

Dated by appellant.

March 23, 1946.

HOMER C. PRICE,
Appellant Propria Persona,
P.M.B. 459,
Alcatraz, California.

[Endorsed]: Filed Mar. 28, 1946.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the above entitled court:

You are hereby requested to prepare a record to be filed in the ninth judicial circuit court of appeals, pursuant to an appeal in the above entitled cause, and to include in such record the following and no other papers and exhibits to wit:

1. Affidavit forma pauperis, dated Jan 2, 1946;

2. Application for Writ of habeas corpus, dated Jan. 2, 1946;

3. Amendment to the application, dated Jan. 14, 1946;

4. Exhibit (a);

5. Exhibit (b);

6. Exhibit (C);

7. Exhibit (D);

8. Exhibit (E);

9. Order to Show cause, dated Jan. 8, 1946;

10. Return to order to show cause, and memorandum of Points and authorities, dated Jan 21, 1946;

11. Order allowing two weeks to file a traverse, dated Jan. 22, 1946;

12. Traverse, dated Jan. 29, 1946; Memorandum of Points and Authorities;

13. Order denying Petition for Writ, dated Feb. 25, 1946;

14. Affidavit for leave to proceed on appeal in forma pauperis, dated March 23, 1946; [38]

15. Notice of appeal, dated March 23, 1946;

16. Statement of Points on appeal, dated March 23, 1946;

17. This designation of record, dated March 23, 1946;

Said record to be prepared pursuant to rule 75 (a) (d) (G) Rules of civil procedure, and is to be filed in the office of the Clerk of said circuit court of appeals for the Ninth Circuit on or before the 2nd day of May, 1946.

Dated this 23rd day of March, 1946, by appellant.

Respectfully submitted,

HOMER C. PRICE,
Appellant Propria Persona,
PMB 459,
Alcatraz, Calif.

[Endorsed]: Filed Mar. 28, 1946.

[Title of District Court and Cause.]

STATEMENT OF POINTS THAT APPELLANT INTENDS TO RELY ON THE APPEAL

Comes now the appellant Homer C. Price, and makes his concise Statement of Points on which he intends to rely on the appeal, as follows:

1.

Where a defendant is charged in the indictment with three Separate and distinct offenses, Set out in Separate counts; and, two Separate and distinct offenses Set out in one count; and, by implication, the court include on additional Separate and distinct offense, the crime of perjury, without a formal indictment, all consolidated in one trial, and, a general verdict of guilty, without specifying upon which offense the general Verdict rested, "is a Void Verdict," and the court should *of* granted the Writ, and allowed the defendant the right to present his evidence to prove the allegations:

2.

That the trial court amended the indictment by implication, to include the collateral crime of perjury, and subpoenaed a witness to prove the collateral crime, and submitted it to the jury, along with the crimes layed in the indictment, "a change of the indictment by the court, deprives the court of the power of proceeding to try the accused," and, the court below should *of* [40] granted this writ,

and allowed the defendant the right to present evidence, to prove the allegations:

3.

Where Verdict of jury is general so that a reviewing court cannot determine that it did not rest on an invalid constitutional ground on which the case was submitted to the jury, the conviction cannot be sustained; and the court below should *of* granted the writ, and allowed the defendant the right to present his evidence to prove the allegations:

4.

That the trial court in passing a general sentence, did invade the province of the jury by its self determining upon what clause of the statute, or crimes, the general verdict rested: and the court below should *of* granted the writ, and allowed the defendant the right to present his evidence to prove the allegations:

5.

That the government knowingly employed false testimony on the trial, to obtain the conviction: and the court below should *of* granted the writ, and allowed the defendant the right to present his evidence to prove the allegations:

6.

The government takes the view that the prior judgments, as to matters which were adjudged in those cases, or which could have been adjudged "if raised" are Res Judicata in a subsequent Petition for writ of habeas corpus, and by the denial of

the [41] Petition upon the return, and traverse, on this ground, "was erroneous."

Respectfully submitted,

HOMER C. PRICE,
Appellant Propria Persona,
P.M.B. 459,
Alcatraz, California.

Dated: March 23, 1946.

[Endorsed]: Filed Mar. 28, 1946. [42]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including June 15, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: May 7, 1946.

MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed May 7, 1946. [43]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing

pages, numbered from 1 to 43, inclusive, contain a true, full and correct transcript of the records and proceeding in the case entitled: Homer C. Price, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, Cal., No. 25537-R, Respondent, as the same now remain on file and of record in my office.

I Further Certify that the cost of the foregoing transcript is $17.20 and that said amount has not been paid by appellant for the reason that he is proceeding in forma pauperis.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said District Court at San Francisco this 24th day of May, A. D., 1946.

C. W. CALBREATH,
Clerk.

By E. H. NORMAN,
Deputy Clerk. [44]

[Endorsed]: No. 11334. United States Circuit Court of Appeals for the Ninth Circuit. Homer C. Price, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: May 24, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

No. 11334

HOMER C. PRICE,

vs.

JAMES A. JOHNSTON, Warden U. S. Penitentiary, Alcatraz, California

Before Denman, Healy and Bone, Circuit Judges

ORDER CONTINUING CAUSE FOR HEARING, AND REQUIRING APPELLEE TO PRODUCE APPELLANT—August 20, 1946

This cause coming on regularly for hearing, there being no one present in open court on behalf of appellant, and Mr. Joseph Karesh, Assistant United States Attorney, appearing for the appellee, and good cause therefor appearing.

It Is Ordered that the hearing of the above-entitled cause be continued to Friday, August 23, 1946, at 10:00 o'clock a. m.

It Is Further Ordered that the Warden of the United States Penitentiary at Alcatraz, California, produce the appellant in open court on Friday, August 23, 1946, at 10:00 o'clock a. m.

It Is Further Ordered that the clerk of the District Court for the Northern District of California forthwith transmit to this Court the original files in the following causes:

No. 23268-W, Price vs. Johnston;
No. 23721-R, Price vs. Johnston;
No. 25040-S, Price vs. Johnston.

[fol. 42] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER VACATING SUBMISSION OF CAUSE—November 14, 1946

Good cause therefor appearing, It Is Ordered that the submission on August 23, 1946, of this cause for consideration and decision, be, and hereby is vacated and set aside.

(Denman, C. J., not participating.)

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ASSIGNING CAUSE FOR HEARING—November 14, 1946

Good cause therefor appearing, It Is Ordered that the above cause be, and hereby is assigned for hearing before the Court en banc at San Francisco, California, on Tuesday, December 10, 1946.

(Denman, C. J., not participating.)

[fol. 44] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR PERSONAL APPEARANCE—Filed November 29, 1946

To the Honorable, the Judges of the Above Entitled Court, En Banc:

If it may please this Honorable Court, now comes, Homer C. Price, the Appellant in the above entitled cause, and moves this honorable Court to issue an order directed to the appellee James A. Johnston, supra, directing said appellee to produce the appellant, before this Honorable Court on Tuesday, December 10, 1946, for the following reasons to wit:

That the appellant has on the aforesaid date, an appeal to re-argue, as said cause was argued by appellant, and counsel for appellee on August 23, 1946, and for reasons unknown to appellant, said order of submission on August 23, 1946, has been vacated and set aside, as of Thursday the fourteenth day of November, 1946:

This Honorable Court on November 14, 1946, further caused an order on its own motion, did re-assign said cause for hearing before the court en banc at San Francisco, [fol. 45] California, on Tuesday, December 10, 1946.

And due to the fact that appellant in this cause is acting as his own counsel, it is earnestly stressed that this Honorable Court issue the aforesaid order as provided by law:

Appearance personally is authorized by the act of: Title 28, sec. 394 (Judicial code, section 272) appearance personally or by counsel, "in all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of the said courts, respectively, are permitted to manage and conduct causes therein," (R. S. sec. 747: Mar. 3, 1911 C. 231 sec. 272, 36 stat. 1064).

Conclusion

Wherefore: Appellant prays that he may have this privilege, of appearance personally, in order that he may present, and argue his cause of appeal.

And appellant will ever pray.

Respectfully Submitted, Homer C. Price, Appellant, Propria Persona.

Dated by appellant November 27, 1946, Alcatraz, California.

[File endorsement omitted.]

[fol. 46] In United States Circuit Court of Appeals

[Title omitted]

Order Continuing Hearing—December 10, 1946

Ordered hearing continued until the further order of the Court.

[fol. 47] In United States Circuit Court of Appeals

[Title omitted]

Order Directing Filing of Opinions, and Denying Motion for Personal Appearance—January 6, 1947

Ordered that the typewritten opinion, concurring opinion and dissenting opinion this day rendered by this Court on motion of appellant for personal appearance be forthwith filed by the clerk.

Pursuant to the majority opinion and concurring opinion, It Is Ordered that the motion of appellant for a personal appearance to orally argue his appeal herein be, and hereby is denied.

[fol. 48] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11,334

HOMER C. PRICE, Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, Appellee

UPON MOTION FOR PERSONAL APPEARANCE

Before Garrecht-Denman, Mathews, Stephens, Healy, Bone, and Orr, Circuit Judges

OPINION—Filed January 8, 1947

HEALY, Circuit Judge:

Appellant Price, who is an inmate of Alcatraz prison, sought release on habeas corpus and his petition was dismissed by the district court. He is not represented by counsel. As is usual in this type of case he has perfected his own appeal, and presumably with the aid of fellow inmates who have become proficient in such matters has supplied us with an elaborate typewritten brief and argument covering his points. He now moves for an order of the court commanding the warden to produce him on the date set for the hearing so that he may orally argue his appeal.

While not so denominated, the motion is nothing other than an application for a writ of habeas corpus. True, the purpose for which the writ is here sought is not one of the several purposes for which such writs might issue at common law, but nonetheless the end to be served is the same, namely, to have the body of the prisoner brought before the court. Because on several occasions in the past panels of this court, improvidently, we think, have issued like commands for the purpose specified in the motion, and more particularly because it has become common practice of

[fol. 49] prison inmates in the circuit to move for a like order on appeal of their causes, we have thought it best to announce our views on the subject in a formal opinion.

At common law several varieties of the writ of habeas corpus were recognized, each serving a specific purpose. The most common and important was the great writ referred to in Art. I, § 9, of the Constitution of the United States, the purpose of which is to inquire into the cause of the imprisonment of one claiming to be unlawfully restrained of his liberty.[1] As indicated in the footnote and in the authorities there cited, the several varieties of the writ were distinguished one from the other by the specific terms declaring the purpose to be served by each. Enough to say here that no species of the writ of habeas corpus known to the law was issuable for the purpose for which the writ is sought in this instance, namely, to enable a prisoner to argue his case in person.

As the basis of his application Price cites a federal statute (28 U. S. C. A. § 394) which provides: "In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein."[2] This statute goes no farther than to affirm the ordinary right of a party to a cause, whether civil or criminal, to conduct his own case without intervention of counsel. It does not, as seems to be the argument, confer any power on the court, or imply in the court any duty other than that

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[1] This variety of the writ was called habeas corpus ad subjiciendum. Another variety is the writ of habeas corpus ad testificandum, the purpose of which is to bring into court one who is confined in order that he may testify in a cause on trial. A third variety, the writ of habeas corpus ad prosequendum, was issued to remove a prisoner in order to prosecute or try him for an offense in the jurisdiction where the crime was committed. There were other less well known varieties of the writ. For discussion of the several varieties and the purpose served by each, consult Ex parte Bollman, 4 Cranch 74, 95, 96; State v. Fabisinski, 111 Fla. 454, 152 So. 207; Black's Law Dictionary, Habeas Corpus.

[2] The statute is derived from § 35 of the Judiciary Act of 1789, 1 Stat. 92.

of permitting the party to do what the statute says he may [fol. 30] do. Nor does it insure the party against external happenings which may circumscribe the right or interfere with its exercise. Where one is imprisoned for felony he is by the very terms of his commitment required to be confined in prison for the period of his sentence. Of necessity he is disabled for the time being from exercising a myriad of rights, many of them of infinitely greater value than that of personally conducting a civil action to which he is or becomes a party. These deprivations are an inevitable and intended consequence of conviction for crime.

It has been suggested, though not by Price, that our Rule 22(1), providing that in this court the appellant "shall be entitled to open and conclude the argument of the case," affords grounds for the motion. The rule has no bearing on the point. It prescribes merely the order of argument. Even though we were in position to lift ourselves by our own bootstraps by the adoption of a rule, this one does not purport to add to our powers.

The thought is advanced, also, that authority for our issuance of the writ applied for is to be found in § 262 of the Judicial Code, 28 U. S. C. A. § 377, providing that "the Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Unless the statutory phrase "necessary for the exercise of their respective jurisdictions" is to be stripped of all meaning, the prescribed condition can not be said to be met. The case is already before us for final disposition, and no impediment of any sort confronts us. Oral argument is not thought prerequisite to decision, in fact is often dispensed with. Certainly oral argument by a party in the situation of appellant, as distinguished from argument by counsel who might be designated to represent him, can not "fairly be said to be reasonably necessary" to the exercise of our appellate jurisdiction. Adams v. United States, 317 U. S. 269, 274. Cf., also, Whitney v. Dick, 202 U. S. 132. In short, unless we substitute whim for necessity, and are further prepared to invent for the occasion a species of the writ unknown to the "usages and principles of law," we are obliged to hold that this statute affords no ground for the

motion. To grant it on the basis of the statute would constitute a palpable abuse or misuse of power.

[fol. 51] The motion, indeed, proceeds on an assumption quite different from that supplied by § 262 of the Judicial Code. The thought appears to be, not that the court needs the party's help, but that the statutory right of the party to conduct his own case implies a corresponding duty on the part of the court to compel his production; otherwise due process of law is not afforded. We have already discussed this doctrine.[3]

Questions of authority aside, it is but just to observe that despite his detention Price has been able substantially to take advantage of the statute he invokes, that is to say, he has in fact managed and conducted his own appeal in all essential particulars, including the argument of it, albeit the argument is in writing. We may add that in exceptional cases of this type, where questions of complexity are raised and it is believed that counsel would be helpful, we have followed the policy of appointing counsel to represent the petitioner; and the same policy is pursued in the district courts.[4] Not a few cases of this exceptional character have been presented by court-appointed counsel throughout. Whether this case is of that exceptional character it is for immediate purposes unnecessary to inquire.

Nor should we overlook the consequences of an easy assumption of the power to order the wardens to bring prisoners into court for the mere purpose of oral argument. There are in the Ninth Circuit, besides the two federal prisons, the penitentiaries of the seven states and two territories comprising the circuit. The inmates of all these far-flung institutions, state and federal, may and do resort to the federal courts for inquiry into the legality of their detention. In recent years the dockets of the courts in several of the districts, and our own calendar, have become crowded with these cases, all of which receive earnest attention. The practice of the district courts of issuing an order

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[3] Compare in this connection, Schwab v. Berggren, 143 U. S. 442; Bell v. United States, 5 Cir., 129 F. 2d 290; Barber v. United States, 4 Cir., 142 F. 2d 805.

[4] Habeas corpus is a civil proceeding, and the petitioner is not, as in criminal cases, entitled to have counsel appointed as a matter of right. Ex Parte Tom Tong, 108 U. S. 556; Dorsey v. Gill, App. D. C., 148 F. 2d 857, 877.

to show cause upon the filing of a petition for the writ has [fol. 52] been productive of a much needed saving of time and effort on the part of courts and prison officials, for in many if not most of the cases it turns out that no disputed issue of fact, but only issues of law, emerge. If the legal questions are decided adversely to the petitioner, the writ does not issue at any stage of the proceeding. Cf. Walker v. Johnston, 312 U. S. 275. But if the present motion were to be held well grounded, not only this court but the district courts would virtually be compelled to order the prisoner brought in in every instance merely that he may conduct his case in person. They could not in fairness make fish of one applicant and fowl of the other. Thus this spurious variant in the field of habeas corpus would outrank in urgency the great constitutional writ itself. One need not be a prophet to foresee the widespread abuse of the writ that would ensue, not to mention the items of fruitless burden and expense. To the legitimate hope of release by legal means would be added inducements not so legitimate; for temporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls.

The motion is denied.

OPINION

STEPHENS, Circuit Judge, concurring in the result:

I am of the opinion that this court possesses the power to aid its appellate duty by exercising its discretion in granting or denying the motion. In the exercise of that power I vote to deny the motion.

DISSENTING OPINION

Dissent of DENMAN, Circuit Judge, in which Judge Orr Concurs:

This circuit court of appeals has rendered a decision on a federal question in conflict with the applicable decisions of the Supreme Court in Adams v. United States, 317 U. S. 269, 275, and in Whitney v. Dick, 202 U. S. 132, 136-137, discussed infra. They hold contra to the court's opinion that in "special circumstances" the circuit court of appeals has the power to require the warden to bring the body of his

opposing litigant before that court to have him there present "in the interest of justice." Cf. Supreme Court Rule 38.

[fol. 53] This dissent is to the denial of the existence of any *power* in this court to compel a warden to produce the body of his opposing litigant where the warden desires to prevent his opponent from arguing his appeal. We are here discussing the court's *power* in the case of such a warden.[1] That is to say, that if a skilled member of the bar, sentenced to be hanged, seeks to argue his appeal we have no *power* to compel a warden to produce him for that purpose in a habeas corpus case in which the balance is between his life and his death—and this though the decision of the appeal may be in a hair's balance in the minds of the judges composing the court.

What seems the fundamental error in the majority's approach is the treatment of a habeas corpus appeal, involving life or death to the appellant or the deprivation of his liberty, as an ordinary civil case. This is shown by footnote 4 of the opinion and in the sentence speaking of what one so convicted is deprived of by his imprisonment, as follows:

> "Of necessity he is disabled for the time being from exercising a myriad of rights, many of them of infinitely greater value than that of personally conducting a *civil* action to which he is or becomes a party. These deprivations are an *inevitable and intended consequence* of conviction for crime." (Emphasis supplied.)

Habeas corpus proceedings are civil in nature but are extraordinarily different from all other civil proceedings. First, as stated, the prisoner litigant is in the custody of his opposing litigant, the warden. Second, it is so concerned with the sentence depriving him of life or of liberty that specific provision is made for it in Article I, Section 9, of the Constitution.

Where, as in the federal criminal procedure, an appeal is provided, it is a denial of due process to the appellant to deny him the right "to be heard . . . according to the established methods of procedure" at the appellate hearing.

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[1] The discussion has no application to the able and conscientious Warden Johnston.

Frank v. Mangum, 237 U. S. 309, 326. Cf. Boykin v. Huff, 121 F. 2d 863, 873 (C. A. D. C.).

[fol. 54] It seems absurd to say that in a habeas corpus proceeding where his life or liberty is equally at stake, we hold that we have no power to bring such an appellant before us to argue his appeal in accordance with our "established method of procedure" because habeas corpus is a civil proceeding.[2] In this court the established method of procedure is that appellant "shall be entitled" to open and close an "oral" argument.[3] Congress in 28 U. S. C. A. 394 made it an "established method of procedure" that all litigants "in all courts of the United States . . . may manage their own causes personally." It is not necessary that an appellant shall appear personally to confer jurisdiction on the court. That jurisdiction was obtained for Price had already filed an appeal from the judgment of conviction. Schwab v. Berggren, 143 U. S. 442, 449. He has prosecuted his appeal in the briefs before us. This dissent is not concerned with the further question whether the Act of Congress instead of constitutional due process confers on the appellant the right in all cases to appear and manage his case. As stated, it is from the court's denial of the power to bring any appellant here to argue his appeal, even if we deem his argument will aid us in its disposition—an argument we also deem a part of our "established method of procedure" for all other appellants.

That federal appellate courts have power to issue such a writ in all cases "in the interest of justice," not to secure jurisdiction but to "aid" in its exercise "in an appeal over which the court has jurisdiction" is stated by the Supreme Court in Adams v. United States, 317 U. S. 269. In that case, in holding at page 275 that the writ was "not

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[2] The denial of the right to be represented by counsel is a violation of due process in an ordinary civil suit to quiet title. Roberts v. Anderson, 66 F. 2d 874, 876 (CCA 10).

[3] Rule 22 (1) provides:

"1. The appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument."

improvidently entertained" by the circuit court of appeals, the Supreme Court states, at pages 274 and 276,

> [fol. 55] "But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts. In exceptional cases where, because of special circumstances, its use as an *aid* to an appeal over which the court has jurisdiction *may fairly be said to be reasonably necessary in the interest of justice,* the writ of habeas corpus is available to a circuit court of appeals. [Emphasis supplied.]
>
> . . . [The] procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property.'"

The majority in its quotation of the words "fairly be said to be reasonably necessary" omits the succeeding words "in the interest of justice." They seem significant.

The Supreme Court had held similarly in Whitney v. Dick, 202 U. S. 132, also cited in the court's opinion. There, at pages 136 and 137, in discussing the writ of habeas corpus which is to be "agreeable to the principles and usages of law" and which may be "necessary for the exercise" of an appellate jurisdiction, the Court says the writ is one issuable both "when necessary *for* and *in aid of* the exercise of a jurisdiction already *otherwise* obtained." (Emphasis supplied.)

In the instant appeal "jurisdiction [was] already otherwise obtained." The majority opinion errs when it states that the writ can not issue when "the case is already before us for final disposition and no impediment of any sort confronts us."

It is thus seen in the above described situation of the condemned lawyer we have the *power* to issue the writ. The Supreme Court so holds. Whether we will exercise the power in any case is dependent upon whether his presence is "in the interest of justice."

There is nothing contrary to this in the earlier case of Schwab v. Berggren, 143 U. S. 442, cited in this court's opinion. There, at page 449, the Supreme Court states

> ". . . We do not mean to say that the appellate court may not, under some circumstances, require his

personal presence; but only that his presence is not essential to its jurisdiction to proceed with the case."

[fol. 56] The majority opinion properly states that no such writ of habeas corpus existed in the appellate court at common law. Yet the Supreme Court holds that, in cases where our jurisdiction is already established, it is a "dry formalism" to deny that Section 14 of the Judiciary Act, now 28 U. S. C. 377, gives us the power to issue the writ whenever it is necessary "in the interest of justice."

The argument of hardship of the last paragraph of the majority opinion and its statement that "They [the courts] could not in fairness make fish of one applicant and fowl of the other" are a confession of motivation but no avoidance of the Supreme Court's decision in Adams v. United States, supra. There the power to issue the writ to bring the prisoner before the appellate court is confined to "exceptional cases." The majority's opinion denies the power to issue it even in the exceptional case where a skilled lawyer may be of real aid to the court in resolving a doubtful question of law upon which his life depends.

For this Ninth Circuit, the Supreme Court's statement that

> "'In special circumstaces, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of habeas corpus is available to a circuit court of appeals"

has added to it the words

> "except where the court thinks the prisoner's management of his case before the court is in the interest of justice."

It well may be asked, "For what other purpose could an appellate court have the power to bring the body of an appellant before it save to enable him to assist the court in his management of his case while there personally present?

The motion for the order should not have been denied because of an absence of our power to grant it.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES CIRCUIT COURT OF APPEALS

Before the Court en banc (Garrecht, Denman, Mathews, Stephens, Healy, Bone and Orr, Circuit Judges)

[Title omitted]

ORDER OF SUBMISSION—February 7, 1947

Ordered appeal herein submitted to the Court on behalf of appellant on briefs filed, and argued by Mr. Joseph Karesh, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINIONS AND FILING AND RECORDING OF DECREE—May 5, 1947

Ordered that the typewritten opinion and dissenting opinions this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[fol. 59] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11,334

HOMER C. PRICE, Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, Appellee

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before Garrecht, Denman, Mathews, Stephens, Healy, Bone, and Orr, Circuit Judges

OPINION—Filed May 5, 1947

HEALY, Circuit Judge:

This appeal challenges the discretionary power of the court to deny a habeas corpus petition because of an abusive

use of the privilege of the writ through the filing of successive petitions presenting seriatim grounds at all times within the knowledge of the applicant. Panels of this court have repeatedly affirmed the existence of such authority,[1] but in view of the importance of the question and the possible bearing upon it of recent Supreme Court decisions the appeal has been set down for hearing before the full bench.

Appellant is serving a sentence of 65 years on a general verdict of guilty under an indictment charging violations of 12 U. S. C. A. §§ 588b(a) and (b) and 588c, relating to bank robbery and assault and kidnapping incidental thereto. The present is his fourth petition for the writ, all of them having been presented to the United States district court [fol. 60] for the northern district of California.[2] On appeal from the first refusal to discharge we affirmed the judgment, Price v. Johnston, 125 F. 2d 806, cert. den. 316 U. S. 677, and a like result was reached on appeal in the second proceeding, Price v. Johnston, 144 F. 2d 260. No appeal was taken from the denial of the third petition.

The instant petition, as originally filed, raised questions concerning the validity of the sentence and the giving of an instruction commenting on evidence of the commission of a collateral offense. Substantially the same questions, among others, had been raised in the district court in the proceeding on the second application.[3] Accordingly, if this were all, the judgment of dismissal would appropriately be subject to affirmance on the basis of the court's refusal to discharge in the second proceeding. Ex Parte Hawk, 321 U. S. 114, 118; Salinger v. Loisel, 265 U. S. 224, 230-232.[4] How-

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[1] Swihart v. Johnston, 150 F. 2d 721; Garrison v. Johnston, 151 F. 2d 1010; Wilson v. Johnston, 154 F. 2d 111, cert. den. 328 U. S. 872.

[2] The first petition was filed in June 1940, the second in September 1942, and the third in August 1945.

[3] These points appear not to have been pressed on the appeal in that proceeding, and they are patently without merit.

[4] In Salinger v. Loisel, after noting that the common law doctrine of res judicata does not extend to a decision on habeas corpus refusing to discharge a prisoner, the Court said that a prior refusal is not without bearing or weight

ever, by way of amendment to his petition the appellant interposed a wholly new ground for discharge, namely, "that the government knowingly employed false testimony" on the trial, to obtain conviction." The specific circumstances of this claim are not further developed in the peti- [fol. 61] tion or in the traverse to the warden's return,[5] but in his brief here the appellant has enlarged upon the point by stating that the United States attorney, in the course of the trial, "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols, and described them, when he could not do so at first." Since the general allegation may be supported by specific proof we treat this statement as though it had been incorporated in the petition, Hawk v. Olson, 326 U. S. 271, 273. So construing the petition, it remains to determine whether the court erred in refusing to inquire into the claim of the knowing employment of false testi-

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when a later application is being considered. "'In early times,' said the Court, 'when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed . . .'" [pp. 230-231.] In the Salinger case there had been a prior refusal to discharge by a court of coordinate jurisdiction and an affirmance of the judgment by the circuit court of appeals. The Supreme Court remarked that had the district court disposed of the immediate application on that ground "its discretion would have been well exercised and we should sustain its action without saying more." [p. 232.]

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[5] The court below issued an order to show cause upon the filing of the petition, and after the warden had made his return setting up the earlier proceedings, the petitioner filed a traverse. The court thereupon, without having issued the writ, discharged the show cause order and dismissed the petition.

mony. Cf. Mooney v. Holohan, 294 U. S. 103, 112. The court's refusal to inquire was concededly predicated on our holding in Swihart v. Johnston, supra [note 1], and cases therein cited.

The records in these several proceedings disclose that throughout his trial appellant was represented by counsel of his own choosing. And since he was himself present at all times he could hardly have been unaware of the described incident or of its implications, nor does he make any such claim. On the face of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now. Yet no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions.

The decision in Swihart v. Johnston, holding that such reservation of grounds amounts to an abusive use of the writ, announced no novel doctrine. That case and those which came after it proceeded upon the authority of Salinger v. Loisel, supra, and Wong Doo v. United States, 265 U. S. 239. In these latter decisions, handed down simultaneously, the Court elaborately considered certain principles applicable to habeas corpus. The Wong Doo case, involving a petition by a Chinese in custody under a deporta- [fol. 62] tion order, is closely analogous to the present. The applicant had presented an earlier petition in which the validity of the order was assailed on two grounds, one of which was that the hearing on which the deportation order rested was not adequate or fair but essentially arbitrary. In the hearing the petitioner had offered no proof in support of this ground, and the district court did not rule upon it, holding merely that the other ground asserted was not good. In his second petition the applicant relied entirely on the ground earlier asserted but not pressed, namely, that the hearing had been unfair. The district court held that the doctrine of res judicata applied and remanded the petitioner, the circuit court of appeals affirming. The Supreme Court held the doctrine inapplicable but nevertheless affirmed the judgment, saying that the situation was plainly one where "according to a sound judicial discretion, controlling weight must have been given to the prior refusal." It observed that the petitioner had full opportunity to offer proof of the ground in the hearing on his first petition and that good faith required that he produce the proof then. Said the Court: "To reserve the proof for use in attempt-

ing to support a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time."

In none of the more recent decisions of the Supreme Court are the principles announced in Salinger v. Loisel or Wong Doo v. United States, supra, overruled or modified. Waley v. Johnston, 316 U. S. 101, and Hawk v. Olson, 326 U. S. 271, reaffirm the rule there stated that the doctrine of res judicata is not applicable in habeas corpus cases, but neither decision casts doubt upon the power of the court, in the exercise of a sound discretion, to decline to consider repeated petitions where it appears that the privilege of the writ is being abused. Practical considerations as well as reason and justice support the exercise of such power. In an earlier opinion in the present proceeding, Price v. Johnston, 159 F. 2d 234, we noted the tendency of prison inmates in this circuit to multiply petitions, with the result that unnecessary and increasingly heavy burdens are thrown on the courts in districts where federal penitentiaries are located; and in Dorsey v. Gill, 148 F. 2d 857, [fol. 63] the court of appeals of the District of Columbia has amassed figures evidencing the occurrence of a like phenomenon in its jurisdiction. Our opinion last above cited comments on the dubious nature of the objectives that seem in many instances to inspire these recurring applications for the writ.

The command of the statute, 28 U. S. C. A. § 461, is that the courts and judges make such disposition of habeas corpus petitions "as law and justice require." A petitioner is entitled to an opportunity to prove his claim of unlawful imprisonment, Hawk v. Olson, supra, p. 279, but good faith requires that he make fair use of the opportunity afforded. Where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ. Conversely, no matter if there have been a multiplicity of petitions, grounds newly asserted and seemingly valid must be inquired into if circumstances appear or are fairly shown to excuse the prior failure to assert them. It should be unnecessary to

add that even in the absence of such a showing the court may issue the writ and proceed to inquire if in a particular case it is thought that the ends of justice dictate that course. We are not here concerned with a compulsive principle analogous to res judicata, nor with some empty formula to be applied without reflection or as a matter of course. We are speaking rather of a discretionary power resting in the conscience of the judge, to be exercised in light of the circumstances of the particular case and on grounds which square with reason and justice.

In this instance there was no abuse of discretion in the dismissal of the petition.

Judgment affirmed.

DISSENTING OPINION

DENMAN, Circuit Judge, dissenting:

Under the pressure of the large number of habeas corpus petitions filed in this circuit, this decision establishes a principle hamstringing a wrongfully imprisoned man. It plainly makes it the law for this circuit that a man convicted on perjured testimony procured by a United States attor- [fol. 64] ney, but who does not discover the facts until after he has filed a petition for the writ on another ground, must serve his sentence—here for 65 years.[1]

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[1] *An ex parte hearing, in effect, on a habeas corpus appeal.* The declared importance of this case is apparent, both as to the principle established and to Price under a 65-year sentence. Yet, regardless of this importance, neither Price, suing forma pauperis, nor any attorney appointed for him, participated in the hearing en banc. This is despite our Rule 22 (1), which has the force of law, that "the appellant shall be entitled to open and conclude the argument of his case."

In this court's opinion, filed on January 8, 1947, to which Judge Orr and the writer dissented, it is held, ignoring our rule and the underlying justice of having Price or some attorney in his behalf participate in the hearing, that we have not the *power* to compel the Warden to produce him so he could participate in the hearing and he was denied his petition for a writ of habeas corpus for that purpose.

In the absence of such power it became the duty of the Warden to determine whether he would obtain what, in ef-

In so narrowing the relief afforded by the writ, this court is but following a continued line of decisions since the increase of such petitions in this court, in which the Supreme Court recently has reversed us. They are: Waley v. Johnston, 316 U. S. 101. Robinson v. Johnston, 316 U. S. 649; Holiday v. Johnston, 313 U. S. 342; Walker v. Johnston, 312 U. S. 275.

The ground of the petition of the appellant, kept from appearing before us, is properly stated in the court's opinion. It is, as there stated, that the prosecuting attorney "knowingly employed false testimony on the trial, to obtain the conviction" and that this false testimony was and was procured in the following manner, namely that the prosecuting attorney "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that [fol. 65] he did not see the pistols, and described them, when he could not do so at first."

The gravamen of the misconduct charged is not the fact that the witness changed his testimony but that the prosecuting attorney knowingly caused the witness to give the false testimony. All the accused and his attorney knew at the trial was that the single prosecuting witness changed his testimony. Obviously this in itself does not warrant a charge of fraud. That it was fraudulently done by persuasion of the prosecuting attorney *could only have been learned after conviction and after the convicted man was in the penitentiary.*[2]

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fect, is an ex parte hearing, by holding from the court the body of his opposing litigant, or would afford Price due process by bringing him into court.

At the hearing we asked the Warden's attorney why Price was not present. He stated that the Warden had advised him that in all habeas corpus cases he was opposed to having the petitioner present at such hearings. What was said in our dissent to the opinion of January 8, 1947, applies *a fortiori* to the case as it developed at the hearing.

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[2] It is only by such an allegation of the prosecuting attorney's wrongful acts that the case is brought within Mooney v. Holohan, 294 U. S. 103, 112.

This fair statement of the appellant's contention is followed by the court's complete and very damaging *non sequitur* with no support in any fact stated in the opinion or in the record here. It is that "On the fact of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now."

This is immediately followed by another *non sequitur* of the last quoted sentence. It is "Yet no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions."

The appellant, denied hearing here, well may meditate bitterly in his cell: "Why pertinent that I did not give reason or excuse for stating the facts of the subornation of the testimony in a prior petition, if the record clearly shows that I knew about it when the testimony was changed and could have had my attorney prove it at the trial?"

For all we know, Price was not apprised of such action of the prosecuting attorney until long after the filing of any prior petition. It is on this that the court, in confusing terms, makes its constricting ruling. It is that "Where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ."

[fol. 66] This confusing because the onus *probandi* concerns *facts* not the *satisfactions of a court.* The true statement of the court's criterion on the facts in issue here is "Where there have been repeated petitions with an apparent husbanding of grounds, the applicant has the burden of showing that a ground newly asserted was in fact previously unavailable or unknown to him."

That is to say, there is a presumption against the petitioner here, not an attorney, that if the time he acquired knowledge of the facts constituting the wrong is not stated in a second petition, he is deemed to have known them at the time he filed the first petition. There is no such presumption in any civil or criminal proceeding of which I have knowledge.

Certainly the creation and application of such a presumption against a non-lawyer petitioner is not such a disposition "as law and justice require" as provided in 28 U.S.C. 461.

Having so ruled, this court then denies Price his right to go forward in the district court and establish his "burden of showing" such facts. It then sustains the dismissal of

the petition without permitting its amendment to show when Price acquired such knowledge of the alleged subornation of perjury leading to his conviction.

True, the multiplicity of petitions in the District Court for the Northern District of California from ingenious and sometimes perjuring pleaders in Alcatraz prison may cause its judges to have a justifiable suspicion that this petition may be "just another."[3] However, that court well may protect itself by requiring an amendment to the petition stating when the knowledge of the facts was secured. It also could protect itself by a rule requiring that such petitions should state when the facts pleaded came to the knowledge of the petitioner.

[fol. 67] Here the absent petitioner, not a lawyer, pleading in propria personam and in forma pauperis, has his petition dismissed with neither the right to sustain his "burden of showing" nor with the right to amend. A similar situation is where a sentence adjudged is invalid on its face but the imprisoned man, not a lawyer, does not realize it. He files a petition on another ground. Under the instant decision he must remain imprisoned because in a second petition setting forth the judgment he has not stated that he did not realize its invalidity until after the first petition was filed.

Nothing in Wong Doo v. United States, 265 U. S. 239 warrants such a denial of justice. In the Wong Doo case the ground of the second petition was set up in a prior petition and the Supreme Court found, at page 241, that the facts supporting it were "accessible all the time" to Wong Doo. Here the ground was not asserted in a prior petition and there is nothing in the record to show that at the prior

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[3] The Supreme Court reversed this court for sustaining the dismissal of a petition for the writ, though stating that it is "True, petitioner's allegations in the circumstances of this case may tax credulity. But in view of their specific nature, their lack of any necessary relation to the other threats alleged, and the failure of respondent to deny or to account for his failure to deny them specifically, we cannot say that the issue was not one calling for a hearing within the principles laid down in Walker v. Johnston, [312 U. S. 275] . . ." Waley v. Johnston, 316 U. S. 101, 104. (Emphasis supplied.)

time any of the facts regarding the prosecuting attorney's wrongful action were then known to Price, confined in a federal penitentiary.

Nor is there anything in the dictum in Salinger v. Loisel, 265 U. S. 224, supporting such a treatment of a petition which for the first time sets forth a justifiable ground for a release of the prisoner. There Salinger's later petition merely repeated the ground of a prior one which, on appeal, had been held not valid. In that case, however, despite the prior decision of the appellate court, the Supreme Court *did consider* the merits and *did not base its decision upon the decision on the prior petition.*

The companion cases of Wong Doo and Salinger were decided in 1924. In the 23 years since, the Supreme Court decisions have made clear the limitations of these decisions—limitations well to be considered, though, as seen, these two cases are not applicable here.

Though ignored by this court, Price's brief points out that in the recent case of Hawk v. Olson, 326 U. S. 271, the Supreme Court upheld Hawk's petition though it states at page 272, it had denied two petitions for certiorari on Hawk's two other habeas corpus proceedings in which the *same* ground was asserted. *A fortiori* should we consider a petition stating a ground never before stated in any petition.

[fol. 68] So also the court's opinion ignores the case of Waley v. Johnston, 316 U. S. 101, 105, where the Salinger case is emphasized for its holding that "the principle of res judicata does not apply to a decision on habeas corpus." There this court was reversed and Waley's petition sustained, the opinion stating

> "The principle of res judicata does not apply to a decision on habeas corpus refusing to discharge a prisoner, Salinger v. Loisel, 265 U. S. 224. It does not appear that on petitioner's earlier application for a writ of coram nobis the same issue was raised as that now presented. The earlier application was denied for insufficiency upon its face and without a hearing. There is thus no basis for the holding of the District Court that the denial is res judicata of the present petition."

Waley, of course, had full knowledge of the threats made to him when he brought his earlier proceeding. The fact

that he reserved the contention for the later proceeding did not prevent its consideration by the Supreme Court.

Likewise in Robinson v. Johnston, 118 F. 2d 98, 101 (C.C.A 9), Healy, C. J., dissenting, this court refused to consider Robinson's petition for a writ of habeas corpus based upon his claimed insanity, because the same claim had been urged in a prior coram nobis proceeding and decided against him, he having first offered and then withdrawn the proof of his mental condition. We were reversed, 316 U. S. 649, on the authority of Waley v. Johnston, supra.

In the case Cochran v. Amerine, 113 P. 2d 1048, a habeas corpus proceeding, the Kansas supreme court states, at page 1049, that Cochran unsuccessfully had filed four petitions, two in the federal court and two in the state courts. Despite the fact that the Kansas supreme court decision was on an appeal from the fifth denial of the writ, the United States Supreme Court granted certiorari, sustained Cochran's contention and reversed the decision. Cochran v. Kansas, 316 U. S. 255.

Nor does the court's opinion consider this court's decision in Johnston v. Wright, 137 F. 2d 914, 915 (CCA 9), where, in sustaining Wright's contention, we state that the identical contention there made by Wright had been con- [fol. 69] sidered in three district court proceedings and disposed of adversely to him before it was decided favorably to him in a fourth petition to a circuit judge.

Surely it is a strange divergence from Johnston v. Wright where we ordered Wright *released* on his fourth petition for the writ, each asserting the *same* grounds, now to *refuse to consider* Price's petition on a ground *never before asserted.* Stranger yet to do so *sub silentio.*

Though not presented here, it is still a serious question whether an innocent man must be imprisoned or hung where his first petition asserts, unsuccessfully, what he considers his strongest claim and consciously reserves for a second petition another ground which, if considered, would free him. For instance, should a man imprisoned on a sentence for life, invalid on its face, spend the remainder of his days in the penitentiary if he "had access to" knowledge of its invalidity and nevertheless filed a first petition on another ground? Would it be the exercise of a "sound" or any permissible discretion for the district court to

dismiss the petition on the grounds stated in the court's instant opinion? If it be beyond the court's discretion so to keep him imprisoned where the judgment is void on its face, does such discretion arise because he has been wrongfully convicted by perjury procured by the prosecution?

The bad situation arising from a burdensome infliction on some of our district courts of a flood of unwarranted petitions should find relief through Congress. Where the petition is perjured there should be a criminal prosecution. With the fascistic tendencies apparent in our American life, the remedy is not in undermining any of our civil liberties, particularly the right to habeas corpus, by bad law.

It may be argued that Price now may file a new petition alleging the fact that, while he knew at the trial of the change of testimony, he did not learn until after his last proceeding was filed that the prosecuting attorney had suborned the perjury to procure his conviction. Thus at the end of another two years in prison, while the federal courts are giving the "summary" disposition of a writ of habeas corpus required by 28 U.S.C.A. 461, Price may be released.

[fol. 70] The absurdity of the argument is patent. Under the rule here established, such a new petition must be denied because the fact of the late acquisition of the knowledge of such subornation was known to Price at the time of the filing of the petition we now dismiss.

The district court should be reversed because it *at least* erred in that it neither (a) permitted Price to go forward and prove that not until after he had filed his first petition had he learned the facts alleged as to the gross misconduct of the prosecuting officers, nor (b) permitted him to amend his petition to show when such knowledge was acquired.

Dissenting Opinion

Stephens, dissenting:

I am unable to subscribe to the majority opinion, because I think by it the holding in Swihart v. Johnston, 150 Fed. 2d 741, is extended beyond its true limitations.

In the Swihart case we held that *controlling weight* in the *consideration* of a petition for the writ of habeas corpus may be given the fact that a former petition, based upon the same cause, had been filed, heard and decided. We did

not hold that the court could refuse to consider a petition for the writ *merely* because a former petition had been adjudicated. No case, so far as I am aware, has ever gone further than the expression we used in the cited case, to-wit, "*One of the matters* which may be considered and given controlling weight is a prior refusal to discharge on a like petition." This expression does not mean and should never be judicially extended to mean that because one petition had been heard and denied, a second petition, based upon different allegations, could or should be dismissed as a matter of course.

No more is stated in the cited case than that *in the consideration* of the second petition the instance of, and the facts connected with, the first petition may turn the scales against the petitioner. And the instance of, and the facts connected with, the first petition, I apprehend, would be that the hearing upon the first petition had been a thorough and adequate trial upon issues again presented in the second petition or that the petitioner was perpetrating a fraud upon the court.

[fol. 71] In the instant case the cause alleged by petitioner is entirely different from any heretofore alleged. If what petitioner now alleges is true, he was convicted upon perjured testimony suborned by the prosecuting attorney. It is entirely unlikely that such a monstrous charge has any truth in it, but such improbability does not authorize the court to brush it aside. Any number of circumstances may have prevented this new and different issue from being set up in the former petitions, and it must not be overlooked that one in prison and longing for freedom is not always in a mental condition to act perfectly or even free to act as and when he desires to do so. It may be petitioner believed that the reasons he gave for his release in the former petitions were entirely sufficient and that he would never be put to the difficult task of proving the charges of the misconduct he now charges to the prosecuting officer. It may be that he has but recently obtained information which in his opinion will prove his charges. The possibilities are endless, and they should not be denied judicial investigation because all of them seem improbable.

It will be a very serious blow to the great writ if it is ever authoritatively decreed that one deprived of his liberty has but one shot for his freedom. This one shot must have

everything; missing anything, and the legal right to show the injustice and illegality of the imprisonment is gone forever. The impact of such a holding cannot be exaggerated. A court should take steps to be sure that "an abusive use of habeas corpus" is present before it rules against the entertainment of the petition, remembering at all times that the basis of the writ is a right and not a privilege. Until Congress, after a thorough consideration of the subject, places a limitation upon the right to the writ of habeas corpus, courts should not decree such limitation.

It is my considered opinion that the pronouncement, without a hearing, of the judgment of dismissal in the instant case constitutes an abuse of discretion as a matter of law.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11334

HOMER C. PRICE, Appellant

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, Appellee

JUDGMENT—Filed and entered May 5, 1947

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[fol. 73] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME

Upon consideration of the application of the petitioner,

It is ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 6th, 1947.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of February, 1947.

[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 23, 1947

On consideration of the motion for leave to proceed further herein *in forma pauperis*,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 76] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 23, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Petition not printed

No. 111

HOMER C. PRICE,

Petitioner,

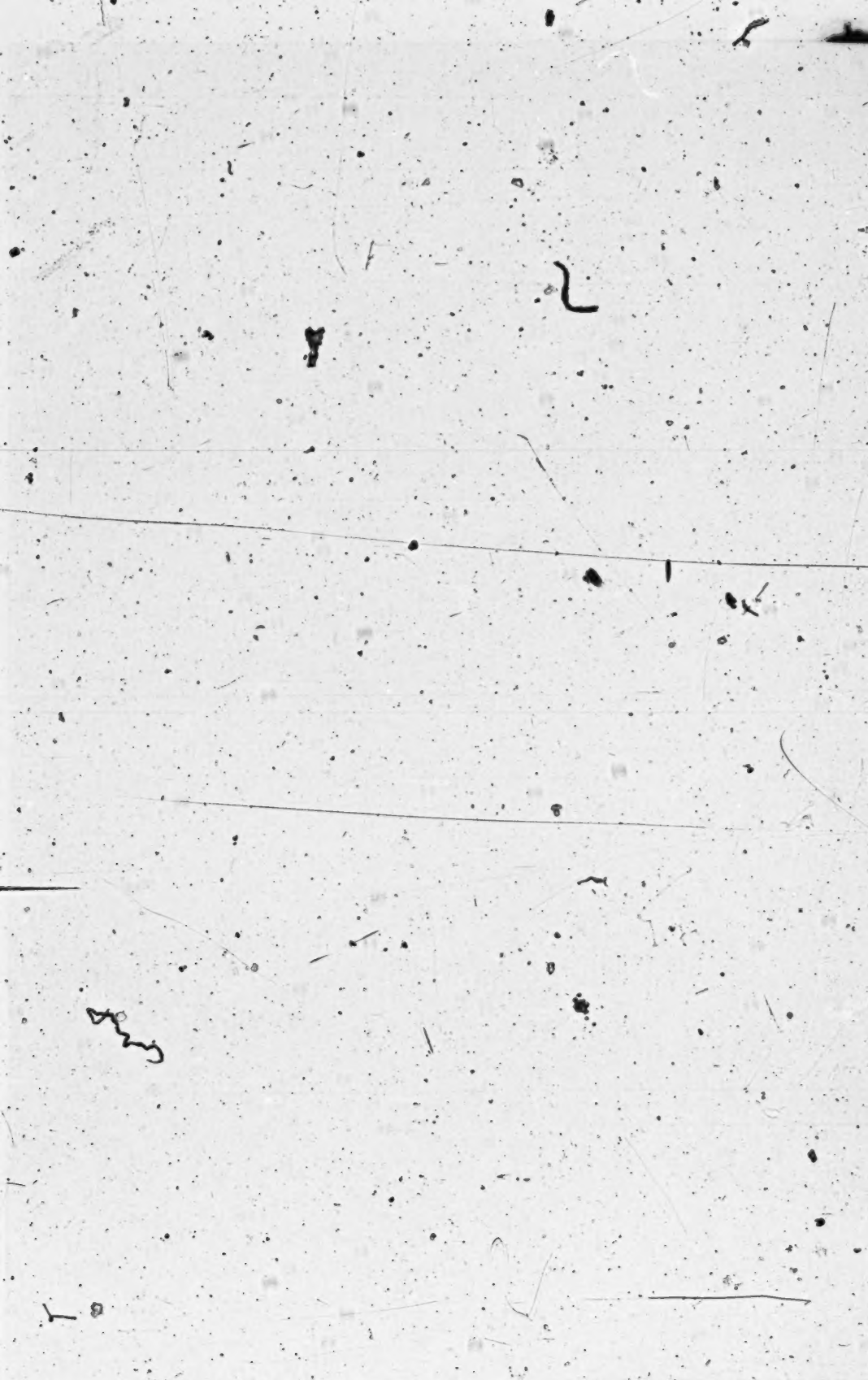
vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

JOSEPH L. RAUH, JR.,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 111

HOMER C. PRICE,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The District Court denied petitioner's application for writ of *habeas corpus* without opinion (R. 30). The opinion of the majority of the Circuit Court of Appeals affirming the judgment of the District Court and the dissenting opinions are officially reported in 161 F. 2d 705 and may be found at pages 53 to 66 of the record. The opinions on petitioner's motion for an order directing his personal appear-

ance before the Circuit Court of Appeals to argue his appeal are reported in 159 F. 2d 234 and may be found at pages 44 to 52 of the record.

Jurisdiction

The judgment of the Circuit Court of Appeals denying petitioner's motion for an order directing his personal appearance before the court to argue his appeal was entered January 6, 1947 (R. 43-44). The judgment affirming the order of the District Court denying petitioner's application for a writ of *habeas corpus* was entered May 5, 1947 (R. 66). On February 25, 1947, Mr. Justice Reed extended to June 6, 1947, petitioner's time to file a petition for writ of certiorari to review the order of January 6 (R. 67). The petition for writ of certiorari was filed on June 4, 1947, and was granted on June 23, 1947 (R. 67). On the same day petitioner's motion for leave to proceed *in forma pauperis* was granted (R. 67) and on October 13, 1947, an order was entered assigning counsel to present petitioner's cause. The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347).

Statutes Involved

Section 262 of the Judicial Code (Power to Issue Writs):

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (28 U. S. C. § 377, Mar. 3, 1911, ch. 231, § 262, 36 Stat. 1162.)

Section 272 of the Judicial Code (Appearance Personally or by Counsel):

> In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein. (28 U. S. C. § 394, Mar. 3, 1911, ch. 231, § 272, 36 Stat. 1164.)

Section 761 of the Revised Statutes (Summary Hearing in Habeas Corpus):

> The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. (28 U. S. C. § 461.)

Questions Presented

1. Whether the District Court erred in denying without hearing or opinion an application for writ of *habeas corpus* alleging that petitioner's conviction had been obtained by the government's knowing use of false testimony when the warden's return in answer to the petition does not challenge the truth of this allegation and defends solely on the ground that petitioner had unsuccessfully initiated three previous *habeas corpus* proceedings, in none of which was this issue properly raised or determined.

2. Whether a circuit court of appeals has power to direct that a prisoner appealing from the denial of his application for writ of *habeas corpus* be brought before the court to argue his own appeal.

Statement

The present proceeding before this Court was initiated January 2, 1946, by a petition for writ of *habeas corpus* in the United States District Court for the Northern District

of California and is predicated upon the allegation "that the government knowingly employed false testimony on the trial, to obtain the conviction". (R. 20). A review of the proceedings leading up to the filing of this fourth petition for writ of *habeas corpus* will be helpful in considering the issues presented by the case at bar.

In 1938, petitioner was indicted (R. 10-14) and convicted (R. 14-16) in the United States District Court for the Eastern District of Michigan under a four-count indictment charging violations of the Federal bank robbery statute, 12 U. S. C. 588(b) and 588(c), by entering a Federally insured bank with intent to rob, robbing the bank by putting an employee in fear, jeopardizing the lives of a bank employee and others by the use of a dangerous weapon, and kidnapping a bank employee in the course of such offenses. Petitioner was sentenced to imprisonment for 65 years (R. 16-17) and committed to Alcatraz Penitentiary (R. 2). Petitioner's unsuccessful efforts to prosecute an appeal from his conviction culminated in the denial by the Sixth Circuit Court of Appeals of his petition for a writ of mandamus seeking to require the District Court to enter a decision upon petitioner's application for an appeal. *Price v. Moinet*, 116 F. 2d 500. Certiorari was denied by this Court upon the ground that the application was not filed within the time allowed by law, 311 U. S. 703, rehearing denied 311 U. S. 729. Petitioner acted as his own counsel in his unsuccessful efforts to secure direct review of his conviction by appeal.

Petitioner is not a lawyer. He has presented his four successive applications for writs of *habeas corpus* to the United States District Court for the Northern District of California without clarity or legal precision. Because of the reliance of the courts below upon these earlier proceedings in denying the present petition, it is necessary to

give a somewhat detailed history of the three earlier applications for writs of *habeas corpus*.

In 1940, petitioner filed an application for writ of *habeas corpus* in the United States District Court for the Northern District of California, seeking his release from imprisonment upon several grounds. The two grounds principally relied upon were that evidence adduced against petitioner at the trial had been obtained in violation of the Fourth Amendment, and that the trial judge had refused to disqualify himself despite prejudice based on his connection with a bank in the vicinity of the robbery. The District Court denied the application for the writ without hearing or opinion and the denial was affirmed by the Circuit Court of Appeals, 125 F. 2d 806. Certiorari was denied by this Court, 316 U. S. 677, rehearing denied 316 U. S. 712. It appears from the record filed with this Court in that proceeding that the application for writ of *habeas corpus*, prepared by petitioner himself, did not allege as a ground for release that his conviction had been obtained by the knowing use of false testimony (Record on petition for certiorari, No. 1081, October Term 1941, pp. 3-15). Petitioner's traverse to the warden's return, however, while not averring the knowing use of false testimony, did call the court's attention to "two different statements" at the trial by the chief prosecution witness, one Donner, and to the "methods . . . used to obtain" this change in testimony (R., No. 1081, p. 87). The traverse did not intimate what those "methods" were. Donner's testimony at the trial was attached as an exhibit (R., No. 1081, pp. 94-199). After the filing of the traverse, the District Court appointed counsel for petitioner (R., No. 1081, p. 200), but subsequent papers in the proceeding were apparently still filed by petitioner in *propria personam*. Petitioner's appeal to the Circuit Court of Appeals assigns as error the trial court's failure to grant him "a fair and impartial trial" in that Donner

reversed his testimony after being taken to the office of the District Attorney (R., No. 1081, p. 234). Point 6 of his petition for certiorari from the judgment in that proceeding seeks to raise this same issue, and asserts "a conspiracy forcing a witness to change his testimony" (p. 43). This point was not, however, referred to by the Circuit Court of Appeals in its opinion or by the Government in its Opposition to Petition for Certiorari in this Court, presumably because not properly raised by petitioner.

In 1942, petitioner filed a second petition for writ of *habeas corpus,* in which he sought release on the grounds set forth in his first petition and also on two principal additional grounds. The first of these new grounds was that petitioner's counsel had been absent from the room during the trial and the other was that petitioner had not had counsel at a preliminary hearing before the U. S. Commissioner. After a hearing, the District Court discharged the writ and the order was affirmed on appeal, 144 F. 2d 260. The petition for writ of certiorari was denied by this Court, 323 U. S. 789, rehearing denied 323 U. S. 819. It appears from the record filed with this Court on the petition for certiorari that this second application for writ of *habeas corpus,* again prepared by petitioner himself, also failed to allege as a ground for release that the conviction had been obtained by the knowing use of false testimony (Record on petition for certiorari, No. 607, October Term, 1944, pp. 4-21). At the hearing before the District Court on this second application, the District Court excluded all evidence of what had occurred during the course of the trial proferred by petitioner's counsel who had been appointed by the court (R., No. 607, p. 71-73), and the knowing use of false testimony does not appear to have been referred to at any stage in this proceeding.

A third petition for a writ of *habeas corpus* was denied by the District Court on August 22, 1945, 61 F. Supp. 995 (R.

22-23). There is nothing in the record or opinion of the District Court to indicate the grounds upon which petitioner relied in this third application, although the opinion of the District Court does state that "petitioner alleges 'that the questions now raised was (sic) not raised in the prior petitions . . .'" The petition was denied by the District Court on the ground that the matters were known to petitioner when he filed the earlier petitions, making the new petition an abusive use of the writ of *habeas corpus*. No appeal was taken from this action and no counsel appears to have been appointed for petitioner.

Petitioner's inartistic and imprecise method of presenting his case continued through the filing of the present petition. On January 2, 1946, petitioner filed his fourth application for writ of *habeas corpus* (R. 5) alleging that he had been denied a fair and impartial trial in that the jury was confused by the presentation of evidence to show perjury before a Notary Public, that the court was not justified in imposing a general sentence on the four counts of the indictment, and that one of the counts did not allege an offense (R. 5-7). On January 8, 1946, the District Court ordered the warden to show cause why the writ of *habeas corpus* should not be issued (R. 19). On January 15, 1946, petitioner filed an amendment to his application adding as a new and separate ground for release the allegation "that the government knowingly employed false testimony on the trial, to obtain the conviction" (R. 20). On January 21, 1946, the warden, through the United States Attorney, filed his return to the order to show cause (R. 20-21). The return did not deny the allegation that the government knowingly employed false testimony on the trial; it simply incorporated by reference the entire record in the three former *habeas corpus* proceedings and asked that the petition be denied on the basis of the District Court's opinion denying the third application. Petitioner's tra-

verse (R. 24-27) stated that the earlier petitions did not contain some of the points presented in the fourth petition and asserted "that petitioner did not in fact have a fair and impartial trial before the trial court, and in fact was denied due process of law" (R. 26).

The District Court denied the petition without hearing or opinion (R. 30). On appeal, a panel of the Circuit Court of Appeals directed that petitioner be brought before the court for the argument of his appeal (R. 41). After the argument, the submission of the cause was set aside (R. 41) and the case was assigned for hearing before the court en banc (R. 42). Petitioner then moved the court en banc for an order directing his appearance for the purpose of arguing his own appeal (R. 42-43). On January 6, 1947, the court denied petitioner's motion for personal appearance (R. 43-44). A majority of the court were of the opinion that circuit courts of appeal are without power to order the production of a prisoner for such purpose (R. 44-48). Judge Stephens stated that he was of the opinion that the court possessed the power to grant the prisoner's motion, but in the exercise of that power he voted to deny the motion (R. 48). Judge Denman filed a dissenting opinion, in which Judge Orr concurred, stating that circuit courts of appeal do have the power to compel a warden to produce the body of his opposing litigant for the purpose of arguing his appeal (R. 48-52).[1]

The appeal was then considered on briefs filed by petitioner and the United States Attorney and oral argument by the Assistant United States Attorney (R. 53). The

[1] The dissenting judges refrained from expressing an opinion on the question whether the court should have exercised this power in the instant case. In his dissent from the action of the court affirming the denial of the petition for writ of *habeas corpus*, however, Judge Denman implied that the discretion should have been exercised in favor of petitioner's motion for personal appearance (R. 58-59, footnote).

brief filed by the United States Attorney on behalf of the warden is reprinted in full in the Appendix. On May 5, 1947, the Circuit Court of Appeals, with Judges Denman and Stephens dissenting, affirmed the order of the District Court denying the application for the writ (R. 66). The majority of the court below, relying upon *Wong Doo* v. *United States*, 265 U. S. 239, held that there was no abuse of discretion in the District Court's dismissal of the petition in view of the three earlier petitions and the "apparent husbanding of grounds" by petitioner.

Specification of Errors to Be Urged

1. The court below erred in failing to direct the District Court to afford petitioner an opportunity to be heard on his allegation that he had been convicted by the government's knowing use of false testimony.

2. The court below erred in holding that there had been an apparent husbanding of grounds for release on petitioner's part and an abusive use of the writ of *habeas corpus*.

3. The court below erred in holding that it was without power to direct that petitioner be brought before it to argue his own appeal.

Summary of Argument

I

Petitioner's allegation that the government knowingly employed false testimony to obtain his conviction stands undenied on the record before this Court. Whether or not this allegation be deemed "improbable and unbelievable," petitioner is entitled to a hearing before the District Court to determine its validity. *Walker* v. *Johnston*, 312 U. S. 275. Petitioner was under no duty to deny in his application for

writ of *habeas corpus* that he knew as much about the suborning of perjury at the time it occurred as he knows now.

II

The court below assumed that petitioner in his earlier application for *habeas corpus* intentionally reserved for later use the ground for release presently relied upon—the government's knowing use of false testimony. On the contrary, petitioner tried and failed to get this point before the courts in the proceeding on his very first application for writ of *habeas corpus*. The assumption of the court below that there had been "an apparent husbanding of grounds" is therefore not only unrealistic as applied to the case of a prisoner in Alcatraz but is directly contrary to the facts in this very proceeding. Furthermore, the "apparent husbanding of grounds," if it was to be relied upon as the basis for decision, presented an issue of fact for the District Court and should have been heard under the rule of the *Walker* case.

III

This Court has repeatedly held that the mere existence of one or more prior petitions for writs of *habeas corpus* is not a sufficient ground to warrant a denial of a new application setting forth a valid ground for discharge. Thus, in *Waley* v. *Johnston*, 316 U. S. 101, this Court, with the Government's consent, directed that the prisoner be given a hearing on his eighth petition for writ of *habeas corpus* despite the fact that his allegations taxed "credulity to the breaking point, especially in view of the lapse of time since his plea of guilty and sentence." Neither *Salinger* v. *Loisel*, 265 U. S. 224 nor *Wong Doo* v. *United States*, 265 U. S. 239, afford the Government any comfort. The dictum in the *Salinger* case rests on the fact that the later *habeas corpus* proceeding was predicated "on the

same grounds that were set up in the earlier case" (p. 230). The *Wong Doo* deportation case, if it has any bearing whatever on the case of a prisoner in a penitentiary as distinguished from a deportee, has relevance only where the prisoner had properly raised the point in his earlier petition, had received a full opportunity at a hearing to present evidence on the point and had refused to avail himself of that opportunity. None of these considerations are present in the case at bar.

IV

The court below and the Government express concern over the flood of petitions for writ of *habeas corpus*. The number of petitions actually being filed do not warrant this concern. Furthermore, this "argument of convenience" is lacking in persuasion when personal liberty and constitutional rights are at stake. Finally, many if not most insubstantial petitions would not have to go to hearing if properly handled by the United States Attorneys.

V

A circuit court of appeals has power under the "all writs" provision of the Judicial Code (28 U. S. C. § 377) to direct that a prisoner be brought before it to argue his own appeal from the denial of his petition for writ of *habeas corpus*. The "all writs" provision is not limited to situations where the court "could not otherwise physically discharge its appellate duties," but applies as "an aid to an appeal" where "reasonably necessary in the interest of justice." *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 273, 274. The court below should have considered petitioner's motion for personal appearance on its merits rather than denying it for want of "power."

ARGUMENT

I

The Court Below Erred in Affirming the Denial of Petitioner's Application as an Abusive Use of the Writ of Habeas Corpus.

The petitioner before this Court has been sentenced to imprisonment for sixty-five years, a life term in all but name. Acting without counsel who had deserted petitioner when funds were no longer available (Record, No. 607, October Term, 1944, p. 25), petitioner unsuccessfully sought to obtain a direct review of his conviction by appeal. He asserts before this Court, as he has before both courts below, that his imprisonment is in violation of his constitutional rights—that he was convicted by the government's knowing use of false testimony. He has never had an opportunity to present evidence on this charge before any court. He asks now one thing only—an opportunity to have the facts underlying this charge heard in the summary way provided for in *habeas corpus* proceedings (Rev. Stat. § 761, 28 U. S. C. § 461). How minute his request becomes when compared to the danger—be it great or small—that an innocent man may languish behind prison walls for the rest of his days.

A

Petitioner's Application for Writ of Habeas Corpus Adequately Raised the Issue of the Government's Knowing Use of False Testimony.

The petition for writ of *habeas corpus* herein, as timely amended, alleged that petitioner's imprisonment was illegal in "that the government knowingly employed false testimony on the trial, to obtain the conviction" (R. 20). The warden's return to the order to show cause did not

deny the truth of this charge (R. 20-21) and, therefore, in no way called upon petitioner to give any further specifications as to the facts underlying this allegation. Petitioner's brief in the Circuit Court of Appeals did, nevertheless, enlarge upon this point by stating that the United States Attorney, in the course of the trial, "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols, and described them, when he could not do so at first" (R. 55). The court below treated "this statement as though it had been incorporated in the petition" (R. 55) and clearly implied, as it could not have done otherwise, that these allegations were sufficient to bring the petition within the doctrine of the *Mooney* case, *infra*, had this been petitioner's first application for writ of *habeas corpus* (R. 55-56).

As this Court has recently stated in reviewing a denial of the writ of *habeas corpus* under similar circumstances in a State court, "petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody, *Mooney* v. *Holohan*, 294 U. S. 103." *Pyle* v. *Kansas*, 317 U. S. 213, 215-216.

There is a suggestion in the opinion of the court below that petitioner "knew as much about the misconduct at the time it is said to have occurred as he knows now" (R. 56) and that, if this were not the fact, it was up to petitioner to have negatived this point in his petition. There is no

warrant in the record for any such assumption of fact nor any duty on petitioner's part to answer it. Petitioner has specifically alleged that the government knowingly used false testimony at the trial to obtain his conviction. The warden's answer did not deny this allegation. In his brief before the court below petitioner set forth some facts underlying this charge (R. 55). It cannot be assumed that this is all the evidence petitioner had or has in support of this charge[2] nor when he became aware of these facts as such or of their significance to his case. The court's compounding of unfavorable assumptions is particularly unrealistic as applied to a layman petitioner drafting his own petition. The implication in the court's opinion that petitioner's application should have denied that he knew all the facts concerning the knowing use of false testimony at the time of the trial or denied that he understood their significance is wholly inconsistent with historical Federal practice that "a petition for *habeas corpus* ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston*, 312 U. S. 342, 350; *Rice* v. *Olson*, 324 U. S. 786, 792. "The petition is not drawn with the desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law." *Tomkins* v. *Missouri*, 323 U. S. 485, 487.

Apparently the court below after compounding these unfavorable assumptions against petitioner was not prepared to rely upon them, for it rested its decision upon the

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[2] See Judge Denman's dissenting opinion: "The gravamen of the misconduct charged is not the fact that the witness changed his testimony but that the prosecuting attorney knowingly caused the witness to give the false testimony. All the accused and his attorney knew at the trial was that the single prosecuting witness changed his testimony. Obviously this in itself does not warrant a charge of fraud. That it was fraudulently done by persuasion of the prosecuting attorney *could only have been learned after conviction and after the convicted man was in the penitentiary*" (R. 59).

existence of the three earlier petitions for writs of *habeas corpus* rather than upon petitioner's awareness of the government's knowing use of false testimony at the time it occurred. What the situation would be if the record did support the court's assumptions, therefore, need not be considered here. Cf. *Moore* v. *Dempsey*, 261 U. S. 86; *Waley* v. *Johnston*, 316 U. S. 101.

In view of petitioner's undenied allegation of the government's knowing use of false testimony, he was entitled to a hearing before the District Court to present his case. *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101. Any "contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." *Walker* v. *Johnston*, 312 U. S. 275, 287. "Petitioner's allegations in the circumstances of this case may tax credulity," *Waley* v. *Johnston*, 316 U. S. 101, 104, but they do not deny him the right to be heard.

B

Petitioner Did Not Intentionally Reserve for Later Use the Issue Presently Before the Court

The court below assumed that petitioner intentionally reserved for later use the ground for release presently relied upon. This assumption, too, was made without basis in fact.

As indicated in the Statement, petitioner, in his inarticulate and legally imprecise manner, did try to raise the knowing use of false testimony earlier. Acting as his own counsel in filing the first petition for writ of *habeas corpus*, he failed to allege the knowing use of false testimony in his application; but he hinted at it in his traverse, and imprecisely raised it in his appeal to the Circuit Court of

Appeals, and in his petition for writ of certiorari in this Court. Apparently the District Court did not consider the allegation in petitioner's traverse about the "methods . . . used to obtain two different statements" at the trial sufficient to raise the issue of the government's knowing use of false testimony for it denied the petition without hearing or opinion. Likewise the matter was not mentioned in the opinion of the Circuit Court of Appeals and presumably was not considered by this Court on the petition for writ of certiorari.

Petitioner again failed to raise this point in his second application for writ of *habeas corpus*. This turned out to be immaterial, however, since the District Court, upon the hearing, excluded all evidence of what occurred at the trial.

Whether the third application for a writ of *habeas corpus* raised the point of the government's knowing use of false testimony does not appear from any papers before this Court or from the published decision of the District Court, 61 F. Supp. 995.

Instead of petitioner intentionally reserving the point on which the present proceeding is based, it seems clear that he made an effort, however legally feeble and unsuccessful, to inject the issue into the proceeding on his first application for writ of *habeas corpus*. What would have happened on his second application, had the District Court not excluded all evidence concerning occurrences at the trial, and what actually did happen on his third application, is not evident from the record. It may well be that petitioner's failure to obtain consideration of this point on his first application discouraged him from trying on the second and third applications—if in fact he did not so try. However that may be, petitioner, by an amendment to his petition for writ of *habeas corpus* in this case, renewed the efforts he had made during the course of the proceedings on his first application and the matter is now properly before this Court.

The court below states that "where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ" (R. 57). But from whence comes this "apparent" husbanding of grounds? The court below had before it the record on the earli applications for writs of *habeas corpus* and could have informed itself of petitioner's efforts, however imperfect and unsuccessful, to raise this point. The court's assumption that petitioner was lying in prison "husbanding" grounds for future applications is hardly a realistic estimation of the joys of Alcatraz.

Furthermore, the warden's answer did not assert any such "husbanding of grounds." All the warden's answer does, in effect, is to say that three prior petitions had been denied; ergo, the fourth petition must be denied. The layman petitioner could hardly be expected to have assumed from this answer that he was supposed to explain why he had never raised the point before—particularly when he had in fact tried to raise the point in at least one earlier proceeding. Such standards of technical pleading would hardly seem applicable when liberty and justice are the stakes. Even "in days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined." Halsbury, L. C., in *Cox* v. *Hakes*, 1890 A. C. 506, 514.

Furthermore again, the District Court, if it was exercising its discretion and denying the petition because of an intentional reservation of the ground for discharge presently relied upon, should have given petitioner an opportunity to controvert the point. As this Court stated in *Pyle* v. *Kansas*, 317 U. S. 213, 216, "In view of petitioner's inexpert draftsmanship, we of course do not foreclose any procedure designed to achieve more particularity in peti-

tioner's allegations and assertions." Certainly the "apparent husbanding" itself, if it was to be relied upon as the ground of decision, constituted an issue of fact for the District Court and should have been heard under the rule of *Walker* v. *Johnston*, 312 U. S. 275.

C

Petitioner's Failure Properly to Raise the Issue Presently Before the Court on an Earlier Application Is Not an Adequate Ground for Denial of the Present Petition for Habeas Corpus.

As has just been shown, the facts completely controvert the suggestion of the court below that petitioner intentionally reserved the issue that his conviction had been obtained through the knowing use of false testimony in order to husband this ground for later use. Furthermore, if this was to be the ground for the denial of petitioner's application, it was certainly an issue of fact to be heard by the District Court rather than to be assumed against a layman petitioner.

The most that can be assumed against petitioner is that, for reasons not appearing in the record, he now raises a point which was not properly raised in his three previous applications and was therefore not passed upon by the courts in the three earlier proceedings. The legal issue before this Court, therefore, boils down to this: Is it within the discretion of a district court to deny an applicant for the writ of *habeas corpus* a hearing on his allegation of the government's knowing use of false testimony for the one and only reason that he had previously filed three other petitions in which this point was neither properly raised nor determined?

Thus stated, the answer becomes clear. The mere existence of one or more prior petitions for writs of *habeas*

corpus is not a sufficient ground to warrant a denial of a new application setting forth a valid ground for discharge. *Kessler* v. *Strecker*, 307 U. S. 22, 25; *Waley* v. *Johnston*, 316 U. S. 101, 105; *Robinson* v. *Johnston*, 316 U. S. 649; *U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220; *Hawk* v. *Olson*, 326 U. S. 271.

The *Waley* case is on all fours with the case at bar. A writ of *coram nobis* and seven petitions for writs of *habeas corpus* had already been denied; the proceeding before this Court arose on petitioner's eighth application for *habeas corpus* which alleged that his plea of guilty had been coerced. The District Court, in its opinion, made the following comment:

> "This is the eighth petition filed by Waley in this Court, the previous ones having been denied. Appeals were taken in two of the cases which were affirmed.[3] Within the last two years this Court has considered and passed upon more than one hundred petitions for writs presented by inmates of Alcatraz prison. At the risk of shocking judicial decorum, I cannot help observing that conjuring of grounds for petitions in *habeas corpus* is a popular indoor sport at Alcatraz." 38 F. Supp. 408.

The Circuit Court of Appeals affirmed and Waley filed his petition for a writ of certiorari with this Court. The Government did not seek to rely upon the earlier petitions for writs of *habeas corpus* as a ground for denying Waley a hearing on his eighth application. Instead, the Government confessed error, the Solicitor General stating:

> "As was recognized in the dissenting opinion [below], petitioner's allegations 'tax credulity to the

[3] In addition to these two appeals and the denial of at least one petition for writ of certiorari (311 U. S. 649, rehearing denied 311 U. S. 729), this Court had also denied a motion for leave to file a petition for writ of mandamus, 305 U. S. 577, and two motions for leave to file original petitions for writs of *habeas corpus*. 307 U. S. 609, 308 U. S. 528.

breaking point,' especially in view of the lapse of time since his plea of guilty and sentence. But we agree with Judge Stephens that they raise material issues of fact calling for a hearing in accordance with *Walker v. Johnston* . . ." (Memorandum for the Respondent, p. 5).

This Court, without permitting argument, reversed the court below and ordered a hearing before the District Court, stating:

> "The principle of *res judicata* does not apply to a decision of *habeas corpus* refusing to discharge a prisoner, *Salinger v. Loisel*, 265 U. S. 224. . . . It does not appear that on petitioner's earlier application for a writ of *coram nobis* the same issue was raised as that now presented. The earlier application was denied for insufficiency upon its face and without a hearing. There is thus no basis for the holding of the District Court that the denial is *res judicata* of the present petition" (p. 105).

Thus, in the *Waley* case, despite the fact that petitioner's allegations taxed "credulity to the breaking point, especially in view of the lapse of time since his plea of guilty and sentence", and despite the application for writ of *coram nobis*, seven prior applications for *habeas corpus* and miscellaneous other proceedings, this Court, with the Government's consent, directed that the prisoner be given a hearing on his new charge that his plea of guilty had been coerced. No more is asked here.

In the *Robinson* case, this Court reversed the Circuit Court of Appeals for the Ninth Circuit under similar, though less extreme, circumstances.

In the *Hawk* case, this Court reversed the Supreme Court of Nebraska despite the argument of its Attorney General that "petitioner has presented nothing new in his instant application for a writ of certiorari, the same issues having been determined several times before by both the Nebraska

and Federal courts, and for this reason alone the District Court of Lancaster County, Nebraska, was justified in denying the application for the writ." (Brief of Attorney General of Nebraska, p. 26.)

The court below and the Government in its Opposition to Petition for Certiorari rely heavily upon two opinions of this Court. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239. Neither of these cases bears on a case such as the instant proceeding where the ground for *habeas corpus* presently relied upon had not been previously considered by the courts.

In the *Salinger* case the question was whether the United States District Court at New Orleans had to or could properly follow the decision of the Circuit Court of Appeals for the Second Circuit denying Salinger a writ of *habeas corpus* predicated on the same grounds as those urged in the District Court at New Orleans. The Court's dictum that the District Court in New Orleans would have been justified in denying the petition for *habeas corpus* pending before it because of the earlier decision by the Second Circuit Court of Appeals was based solely on the fact that the Circuit Court of Appeals had decided the identical question that was being presented to the District Court at New Orleans. The opinion makes this abundantly clear (at pp. 230-231):

> " . . . *the right to arrest and remove in virtue of the indictment was questioned on the same grounds that were set up in the earlier case in New York, where that right was upheld.* Because of this situation, counsel for the appellee invoke the doctrine of *res judicata* and insist that the decision in the New York case was a final adjudication of the right and is binding on all other courts, including this Court. We are unable to go so far . . . But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered . . . : The federal statute . . . does not

lay upon any specific rule on the subject, but directs the court 'to dispose of the party as law and justice require.' A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case; and (b) *a prior refusal to discharge on a like application . . .*" (italics supplied).

Notwithstanding the earlier decision of the Second Circuit Court of Appeals on the identical question presented in the second proceeding, this Court did go on to consider the merits rather than base its decision on the prior proceeding.

The *Wong Doo* case likewise turned upon the point that the issue in the second petition for a writ of *habeas corpus* was identical with that raised in the first petition. In his first petition for writ of *habeas corpus*, a Chinese in custody under an order of deportation challenged the validity of that order on two grounds. The first ground was that the Secretary of Labor issued the order without lawful jurisdiction and the other was that the administrative hearing on which the order rested was unfair and arbitrary. At a hearing before the District Court on these issues, the petitioner offered no proof in support of this second ground. The District Court ruled that the first was not good in law and dismissed the petition and the Circuit Court of Appeals affirmed. In the second petition, the Chinese relied entirely on the ground that the administrative hearing was unfair and arbitrary and this Court affirmed the denial of the second petition with the following statement (at p. 241):

"... The only ground on which the order for deportation was assailed in the second petition had

been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. *If an alien whose deportation has been ordered can do what was attempted here, it is easy to see that he can postpone the execution of the order indefinitely.* Here the execution already has been postponed almost four years." (Italics supplied.)

The error into which the court below fell is illuminated by its primary reliance upon the *Wong Doo* deportation case. This Court in effect held in that case that the Chinese was deliberately "stalling" in order to remain in this country. It is hard to see how such a case can be considered any precedent whatever for a prisoner in Alcatraz with no possible reason for engaging in dilatory tactics. Furthermore, if it could be considered a precedent to even the remotest degree, its relevance would be limited to a case where the prisoner had properly raised the point in his earlier petition, had received a full opportunity at a hearing to present evidence on the point and had refused to avail himself of that opportunity. None of these considerations are present in the case at bar.

It is not necessary for this Court to decide at this time whether the dictum in the *Salinger* case and the holding in the *Wong Doo* deportation case will be applied in future *habeas corpus* proceedings where a petitioner has previously had a hearing on the ground of which he later

relies.[4] That case is not before this Court and need not be considered now.[5] The significant thing for this case is that the court below and the Government are forced to rely upon decisions of this Court bearing on that problem rather than on the issues presented by the case at bar.

D

The Bugaboo of a Flood of Petitions for Writs of Habeas Corpus

The court below referred to "the tendency of prison inmates in this circuit to multiply petitions, with the result that unnecessary and increasingly heavy burdens are thrown on the courts in districts where federal penitentiaries are located" (R. 57), and the Government in its Opposition to Petition for Certiorari states that "the problem of successive petitions for writs of *habeas corpus* is one which is causing increasing concern to the courts. It does not aid the cause of a person justifiably entitled to relief to have the courts flooded with a mass of successive petitions which

---

[4] The majority view in state courts seems to be that even the same ground may be relitigated in a hearing on a subsequent petition. *Rogers* v. *Superior Court*, 145 Cal. 88, 78 P. 344 (1904); *People ex rel. Carlstrom* v. *Shurtleff*, 355 Ill. 210, 189 N. E. 291 (1933); *People ex rel. Maglori* v. *Siman*, 284 Ill. 28, 119 N. E. 940 (1918); *Crebs* v. *Hudspeth*, 160 Kans. 650, 164 P. 2d 338 (1945); *In re Clyne*, 52 Kans. 441, 35 P. 23 (1893); *Cusic* v. *Jones*, 239 Ky. 538, 39 S. W. 2d 1005 (1931); *In re Snell*, 31 Minn. 110, 16 N. W. 692 (1883); *In re Clark*, 208 Mo. 121, 106 S. W. 990 (1907); *In re Pyle*, 72 Mont. 494, 234 P. 254 (1925); *Ex parte Nabors*, 33 N. M. 324, 267 P. 58 (1928); *Ex parte Burton*, 58 Okla. 754, 161 P. 552 (1916); *Ex parte Johnson*, 1 Okla. Crim. Rep. 414, 98 P. 461 (1908); *In re Turner*, 92 Vt. 210, 102 A. 943 (1918); *Miskimmins* v. *Shaver*, 8 Wyo. 392, 58 P. 411 (1899).

[5] Also not presented here is the case of a layman petitioner intentionally reserving one ground for release while he litigates another ground he erroneously considers sure of success. In such a case, as Judge Denman asks, "should a man imprisoned on a sentence for life, invalid on its face, spend the remainder of his days in the penitentiary if he 'had access to' knowledge of its invalidity and nevertheless filed a first petition on another ground" (R. 63)?

mus' go to hearing, however unsubstantial their foundation" (p. 8).

In the first place, the number of petitions actually being filed hardly warrant this concern. "If the Courts below are apprehensive about the rate at which petitions for the writ are filed in their judicial district by inmates of Alcatraz, it must be remembered that over a ten year period only 368 petitions were filed in the District Court below. This would not seem to establish a worrisome burden. It means that each of the four district judges has been required to pass upon an average of nine such petitions per year" (Brief for the American Civil Liberties Union of Northern California, *Amicus Curiae*, pp. 14-15). Nor has there been any significant increase in recent years despite decisions such as that in the *Waley* case. The average number of petitions for *habeas corpus* filed in the Northern District of California during the fiscal years 1943 through 1945, according to figures supplied by the Administrative Office of the United States Courts, was only forty per year or ten per judge. If the burden should ever become too great, the answer would be in additional judges, not restrictions on the great writ of *habeas corpus*.

In the second place, this "argument of convenience" is lacking in persuasion when personal liberty and constitutional rights are at stake. "If the inconvenience were great, the citizen's right to liberty is greater." *In re Snell*, 31 Minn. 110, 113, 16 N. W. 692, 693 (1883).

Finally, the truth of the matter is that multiple petitions for *habeas corpus*, if insubstantial, do not have to go to hearing and burden the courts. The real cause for the difficulty in the case at bar is the cursory and inadequate treatment given the case by the United States Attorney. The warden's answer, filed by the United States Attorney, seems almost a calculated effort to force the courts below to accept the principle that the three earlier petitions were *per se* grounds for denying the fourth petition; the alternative for the courts

was to wade through three long records to find out what the case was about. Had the United States Attorney done his job properly, this case might very well not be here. If he intended to rely upon some abuse of the writ of *habeas corpus—e. g.*, the intentional husbanding of grounds for later use—he could have asserted this ground and forced petitioner to show his hand. If he intended to challenge the merits of petitioner's case, he could have denied petitioner's allegation of the knowing use of false testimony and filed a statement of the facts as he understood them. This would have placed on petitioner the burden of setting forth sufficient facts so that the District Court could have determined whether there was any real issue of fact to be heard. *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101. In either event, this proceeding might have terminated at an earlier stage. The denial of the petition can hardly be supported on the ground of saving the courts from undue burden when there are methods of accomplishing this end more consistent with the protection of personal liberty and constitutional rights.

II

The Court Below Erred in Holding That It Was Without Power to Direct That Petitioner Be Brought Before It to Argue His Own Appeal.

Congress has expressly provided in Section 262 of the Judicial Code that the circuit courts of appeal "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." 28 U. S. C. § 377. A majority of the court below held that "unless the statutory phrase 'necessary for the exercise of their respective jurisdictions' is to be stripped of all meaning, the prescribed condition can not be said to be met. The case is already before us for final

disposition, and no impediment of any sort confronts us (R. 46)." The suggestion of the court below that the writ can only be issued to overcome some physical impediment preventing the court from acting is the same argument that was squarely rejected by this Court in *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269. The question there was whether the Circuit Court of Appeals had properly issued a writ of *habeas corpus* to test out the validity of a waiver of jury trial by a lawyerless defendant, when this same issue could have been decided in the pending appeal, though less expeditiously and conveniently to all concerned. Approving the issuance of the writ, this Court stated flatly that "a circuit court of appeals is not limited to issuing a writ of *habeas corpus* only when it finds that it is 'necessary' in the sense that the court could not otherwise physically discharge its appellate duties" (at p. 273). After rejecting the narrow interpretation of the "all writs" section adopted by the court below in the instant case, this Court went on to state the clear rule that "in exceptional cases where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of *habeas corpus* is available to a circuit court of appeals" (at p. 274). What is "reasonably necessary in the interest of justice" varies from case to case. But that the power to issue the writ is not limited to cases where the appellate court could not otherwise perform its functions is now too clear for belabored discussion. See also *Whitney* v. *Dick*, 202 U. S. 132, 136-137; Section 272 of the Judicial Code, 28 U. S. C. § 394.

The Government in its Opposition to Petition for Certiorari does not seriously question this conclusion. It argues primarily that it is unnecessary to consider this issue in the instant case because, even if the Circuit Court of Appeals had known that it had the power to act, it would have

exercised its discretion to deny the writ. This contention would, if accepted, require this Court to substitute its own discretion for that of the court below. Unless it would have been an abuse of discretion for the court below to have issued the writ, it would certainly not seem appropriate for this Court at this time to tell the court below that it could not exercise its discretion to issue the writ.

On the issue of discretion, the Government referred to several factors allegedly demonstrating why there would be no warrant for the court below exercising its discretion in favor of granting petitioner's motion to argue his own case (p. 9):

(1) "The question involved on petitioner's appeal was one of judicial policy, in regard to which the arguments of a layman could have little significance." But the court below relied largely on a question of fact—the "apparent husbanding of grounds." Certainly, if this point was troubling the court below at the oral argument, petitioner could have thrown substantial light on the matter by explaining his efforts to get the point before the courts in at least the proceedings on his first application.

(2) "Whatever considerations petitioner wished to advance could be fully presented in briefs." This might well be an argument if both sides had presented their case on briefs. See *Goldsmith* v. *Sanford*, 132 F. (2d) 126, 127 (C. C. A. 5th, 1942), certiorari denied 318 U. S. 762, rehearing denied 318 U. S. 799. But here the Assistant United States Attorney argued the case orally without opposition. Furthermore, the brief filed by the Government was so skimpy and inadequate that petitioner had no real notice of what the Government's argument in court would be and was wholly unable to answer it by his brief. The Government's brief in the court below is set forth in full in the Appendix.

(3) "Petitioner was confined in a penitentiary set aside for the incarceration of hardened criminals and the court below was clearly justified in taking into consideration the potentialities of escape and the expense to the Government of requiring the production of petitioner under guard." Of course this was a relevant consideration for the court below to weigh against the considerations presented by petitioner that he be allowed to argue his own case "in the interest of justice." But certainly this factor alone would not make the granting of the writ an abuse of discretion and therefore this Court ought not to withhold decision on the question of "power" simply because the decision on "discretion" might have gone against petitioner.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

JOSEPH L. RAUH, JR.,
Counsel for Petitioner.

IRVING J. LEVY,
WILLIAM W. KRAMER,
Of Counsel.

December, 1947.

APPENDIX

No. 11,334

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HOMER C. PRICE, *Appellant*,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, *Appellee*

BRIEF FOR APPELLEE

Jurisdictional Statement

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below," denying appellant's petition for writ of habeas corpus and discharging the order to show cause (Tr. 32). The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U. S. C. A. Sections 451, 452 and 453. Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U. S. C. A. Sections 463 and 225.

Statement of the Case

The appellant, an inmate of the United States Penitentiary at Alcatraz Island, California, filed a petition for a writ of habeas corpus (Tr. 1-19), and the Court below issued an order to show cause (Tr. 20). The appellant likewise filed an "Amendment to the Application for Writ of Habeas Corpus" (Tr. 21). Thereafter the appellee filed a return to the order to show cause (Tr. 22-23), and a memorandum of points and authorities in support thereof contending that the petition should be denied on the basis of the prior denials in habeas corpus cases numbered 23268-W, 23721-R and 25040-S (Tr. 24-25). The appellant then filed a "Traverse to Respondent's Answer to Amended Application for

Writ of Habeas Corpus" (Tr. 27-31). The matter was then submitted and the Court below filed its written order denying the petition for writ of habeas corpus and discharging the order to show cause (Tr. 32). From this order appellant now appeals to this Honorable Court (Tr. 37).

Question

Was the Court below under an obligation to produce the body of appellant before it to determine if he was entitled to his discharge?

Contention of Appellee

The answer to the above stated question is: No.

Argument

On the record before it, the Court below was under no obligation to issue the writ and properly decided the merits of appellant's petition on the order to show cause.

In denying the third application of appellant for a writ of habeas corpus, his Honor United States District Judge A. F. St. Sure filed the following memorandum and order:

> "Petitioner seeks his release from Alcatraz Penitentiary on this third petition for writ of habeas corpus. The first, No. 23268-W, was heard and denied on January 14, 1941 by Judge Martin I. Welsh. On appeal, with the entire record of the matter before it, and after lengthy discussion, the judgment of the District Court was affirmed. Price *v.* Johnston, 125 F. (2d) 806. Certiorari was denied by the United States Supreme Court, 316 U. S. 677. The second petition, No. 23721-R, was heard by Judge Michael J. Roche, petitioner being present in court, and was denied by Judge Roche on September 8, 1943. On appeal the order of the District Court was affirmed. Price *v.* Johnston, 144 F. (2d) 260.
>
> "Petitioner alleges 'that the questions now raised were not raised in the prior petitions Nos. 23268-W and 10.671 R.' However, these matters were known to petitioner when he filed the petitions in 23268-W and

23721-R. If petitioner intended to rely on these matters he should have urged them in 23268-W. 'To reserve them for use in a later proceeding "was to make abusive use of the writ of habeas corpus."' Swihart *v.* Johnston, United States Circuit Court of Appeals for the Ninth Circuit, decided August 6, 1945.

"Since upon the face of the petition petitioner is not entitled to the writ, Walker *v.* Johnston, 312 U. S. 275, 284, it is therefore

"Ordered:

"The petition for writ of habeas corpus is hereby

"Denied.

"Dated: August 22, 1945."

(Tr. 24-25.)

Appellee is in accord with the reasoning of Judge St. Sure and the authorities cited in his memorandum and order denying appellant's third application for a writ of habeas corpus, and hereby adopts them *in toto* as his argument on this appeal to sustain the Court below in its decision denying appellant's fourth application for a writ of habeas corpus in our case at bar.

Conclusion

In view of the foregoing, it is respectfully submitted that the order of the Court below in denying petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, August 2, 1946.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.



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No. 111

In the Supreme Court of the United States

OCTOBER TERM, 1947

HOMER C. PRICE, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 111

HOMER C. PRICE, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the majority of the circuit court of appeals affirming the judgment of the district court and the dissenting opinions (R. 53–66) are reported at 161 F. 2d 705. The opinions on petitioner's motion for an order directing his production in court to argue his appeal (R. 44–52) are reported at 159 F. 2d 234.

JURISDICTION

The judgment of the circuit court of appeals denying petitioner's motion for an order directing

his personal appearance before the court to argue his appeal was entered January 6, 1947 (R. 43–44). The judgment affirming the order of the district court denying petitioner's application for a writ of habeas corpus was entered May 5, 1947 (R. 66). On February 25, 1947, Mr. Justice Reed extended to June 6, 1947, petitioner's time to file a petition for a writ of certiorari to review the order of January 6 (R. 67). The petition for a writ of certiorari was filed on June 4, 1947, and certiorari was granted on June 23, 1947 (R. 67). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a court may, on consideration of a fourth successive petition for a writ of habeas corpus, give controlling weight to the denial of the three earlier applications, where the earlier records show that the fourth petition in fact presents no new contentions.

2. Whether, assuming that the fourth petition did contain a new allegation, a court is warranted in denying that fourth petition because of an abusive use of process in the filing of successive petitions, where the fourth petition for the writ fails to show when knowledge of the newly alleged contention came to petitioner's knowledge, or why it was not previously raised.

3. Whether a prisoner who, without counsel, has appealed from the denial of a writ of habeas corpus, is entitled as of right to be brought before the appellate court to argue his appeal.

STATUTES INVOLVED

Section 262 of the Judicial Code (28 U. S. C. 377) provides in part:

> * * * The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 272 of the Judicial Code (28 U. S. C. 394) provides:

> In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

R. S. 754 (28 U. S. C. 454) provides:

> Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or

authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

R. S. 755 (28 U. S. C. 455) provides:

> The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

R. S. 760 (28 U. S. C. 460) provides:

> The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

STATEMENT

On February 15, 1938, petitioner was indicted in the Eastern District of Michigan in four counts charging violation of the federal bank robbery statute, 12 U. S. C. 588b and 588c, by entering a federally insured bank with intent to rob, robbing the bank by putting an employee in fear, jeopardizing the lives of a bank employee and others by the use of a dangerous weapon,

and kidnapping a bank employee in the course of such offenses (R. 10–14).

Petitioner was arraigned on February 18, 1938, at which time he was represented by counsel; he waived the reading of the indictment and pleaded not guilty (144 F. 2d 260).

Petitioner was represented by counsel of his own choosing at the trial, which commenced on April 19, 1938, and concluded on April 29, 1938. On the latter date, the jury returned a verdict of guilty on all counts of the indictment. Petitioner was also represented by counsel when the trial court pronounced sentence on May 14, 1938, sentencing him generally to imprisonment for 65 years. (R. 15–17; 144 F. 2d 260.) Thereafter petitioner was duly confined in the United States Penitentiary at Alcatraz (R. 21).

A petition to mandamus the trial judge to enter a decision upon petitioner's application for an appeal was denied because "no application for appeal is pending before respondent or in the United States District Court for the Eastern District of Michigan." *Price* v. *Moinet*, 116 F. 2d 500 (C. C. A. 6), certiorari denied because filed out of time, 311 U. S. 703, rehearing denied, 311 U. S. 729.

Since his confinement, petitioner has on four separate occasions, of which the present proceeding is the latest, applied for a writ of habeas corpus. The scope of the issues here requires

that the issues in the earlier applications be set out in detail.

I. The first petition was filed in 1940, in the United States District Court for the Northern District of California. Petitioner sought release from confinement on the grounds that evidence adduced against him at his trial had been obtained in violation of the Fourth Amendment, and that the trial judge had improperly held insufficient an affidavit of prejudice filed against him. (R. 3–14, No. 1081, Oct. T. 1941.) The district court issued an order to show cause, return was made, and petitioner filed a "Motion to overrule Respondent's return and issue writ" (R. 84–91). Point V of petitioner's motion was as follows (R. 87):

> Because the respondent shows falsely on the affidavit by Assistant United States Attorney John W. Babcock, respondent's Exhibit 'A', where he states that there was no determination of any one in said office of the United States Attorney to have him convicted falsely. Petitioner calls the attention of this Honorable Court to the testimony of transcript of record at page 35 Second part. Recross examination of the one and only witness that the government produced to testify that there had been a crime committed as charged in indictment #24629. Petitioner's Exhibit 'A', testimony given by Fred T. Donner, and it will show just what methods was used to ob-

tain two different statements from this witness.

Attached to petitioner's motion as Exhibit F was the cross-examination of the witness Donner at petitioner's trial (R. 94–199). We set out below the two excerpts from that exhibit which are material here.

(a) Recross-examination of the witness Donner by Mr. Salowich, on behalf of the defendant Simunov, morning session, April 20, 1938 (R. 181–182):

Q. How many times have you talked with Mr. Babcock [Assistant U. S. Attorney] about this case?

A. Twice.

Q. When is the last time?

A. Last night.

Q. After you left the stand?

A. Yes, sir.

Q. Is your recollection any better today than it was yesterday?

A. My recollection was all right yesterday, only I was nervous.

Q. You are not nervous today?

A. Not so nervous as I was yesterday. I have never been in a court room before, on the witness stand.

(a) Recross-examination of the witness Donner by Mr. Payne, on behalf of the defendant Price (the present petitioner), afternoon session, April 20, 1938 (R. 194–196):

Q. Witness, perhaps I misunderstood your testimony this morning. Did I under-

stand you correctly to say that last night after you left here, you went up to the department of Justice, or the District Attorney's office, and you discussed your testimony? A. Yes, sir.

Q. And whom did you discuss it with?

A. With the District Attorney, and the assistant.

Q. And after that discussion, you remembered some things that you have testified to this morning?

A. I remembered them yesterday, but I just—I was nervous and forgot them.

Q. And did you remember at that time, in your description to me yesterday, of the man that was sitting in the car when you were first accosted, that you could not tell what type of a gun it was, you could only see the barrel? Do you remember telling me that, or do you not?

A. Yes, I think I did say that.

Q. What changed your mind, witness?

A. Nothing, only I gave more complete description perhaps today than I did yesterday.

Q. Well, yesterday you tried to give the jury a complete description of what you saw in the man's hand, who was seated in the car, didn't you?

A. I said yesterday that he had a gun, didn't I?

Q. Well, you remember being asked, witness, to describe the gun, and you were not able to at that time?

A. I described it just the same as I did now.

Q. Do you remember saying that you could only see a part of the barrel? A. I didn't say part of the barrel.

Q. Well, yesterday in your cross-examination, did you or did you not describe any more of the gun than you claim was in the man's hand?

The COURT. Which man?

Mr. PAYNE. Who was seated in the automobile, other than just the barrel of that gun.

The COURT. Which man?

Mr. PAYNE. The man who was seated within the automobile, your honor, at the time he was accosted.

The COURT. You mean before he got into the car?

Mr. PAYNE. Yes, sir.

The COURT. According to his claim, it was——

Mr. BABCOCK [Assistant U. S. Attorney]. Simunov.

Mr. PAYNE. The defendant Simunov.

The COURT. Yes.

Mr. PAYNE. That is whom I am speaking of.

Q. What was the question, please?

(Question read by the reporter as above recorded.)

A. I think I said I saw the gun, did I not?

Q. Well, my recollection and yours per-

haps do not agree on it, but the statements that you made yesterday were all true to the best of your recollection, were they not? A. Yes, sir.

Q. And your conversations last night after you left the court didn't assist you in giving any testimony, did they?

A. No, it did not, only that I had an opportunity, I wanted an opportunity to bring out something that I hadn't said.

Q. Did it refresh your recollection?

A. No, it just—there were just some things I didn't tell in my story, that is all.

Petitioner moved for the appointment of counsel (R. 17), and the pleadings in the habeas corpus proceeding being complete, counsel was duly appointed for him by the district court (R. 200). Thereafter, following argument and submission, the district court denied the application for a writ of habeas corpus and dismissed the petition (R. 201).

Petitioner then moved, *pro se*, for a rehearing, on the ground that the court-appointed attorney "blocked your petitioner from filing an amended petition to include additional points so they could be reviewed on appeal" (R. 213).

On appeal, petitioner still acting *pro se*, his fifth point was that he was denied a fair trial because the witness Donner changed his testimony after the District Attorney talked to him (R. 234). The opinion of the circuit court of appeals affirming the denial of relief considers

at length the points made in the petition for habeas corpus; it does not deal with any of the points first raised on appeal. *Price* v. *Johnston,* 125 F. 2d 806 (C. C. A. 9). Price then applied for certiorari, raising *inter alia* the point that Donner changed his testimony (Pet. 32); this Court denied the writ. *Price* v. *Johnston,* 316 U. S. 677, rehearing denied, 316 U. S. 712 (No. 1081, Oct. T. 1941).

II. Within four months after the final action by this Court on his first petition, petitioner on September 24, 1942, filed a second petition for a writ of habeas corpus (R. 4–22, No. 607, Oct. T. 1944). In the second petition he sought release on grounds earlier set forth, and also on two principal additional grounds, viz., that petitioner's counsel had been absent from the trial, and that petitioner had not had counsel at the preliminary hearing before the United States Commissioner.

The lawyer who had represented petitioner in connection with the first application was permitted to withdraw, and another lawyer was appointed by the district court to serve as counsel for petitioner (R. 24). This lawyer filed an amended petition for the writ (R. 25–48). The writ issued (R. 53, 56), there was a hearing at which petitioners' counsel was present (R. 58), a further amendment of the petition was allowed (R. 59–60), and testimony was taken, petitioner

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giving evidence on his own behalf (R. 63 *et seq.*). Neither in this second petition nor in his testimony did petitioner allege that false testimony had been knowingly used at his trial. On further redirect examination by his own counsel, Robert Ransom, Esq., petitioner testified as follows (R. 82–83):

> Q. Mr. Price, you originally wrote up this petition for a writ of habeas corpus. Are there any other facts substantiating your allegations that you would like to bring to the attention of the Court? A. There were three things that took place in the conversation between myself and Mr. Richmond during the time that I was held from the 5th of February to the 10th.
>
> Q. Have you testified to that? A. I have not yet.
>
> Q. Will you please tell us what took place? A. While I was under these threats that I told you that these agents made while holding me, I was taking Richmond at his word, and I told him that I had won $500 playing poker the night before when I got through work, and another incident I told him about some money that I had received from my grandmother's estate in West Virginia before her death, and all those matters were used against me at the trial; in fact they subpœnaed one witness from West Virginia who was administrator of my grandmother's estate, and when I told him these things I did

so because I was in fear of what he might do to my wife and children.

Mr. RANSOM. That is all.

Petitioner errs in stating (Pet. Br. 6, 16) that "the District Court excluded all evidence of what had occurred during the course of the trial." It admitted testimony relating to petitioner's contention that his counsel had been absent at the trial (R. 78–79; Resp. Exh. A). And the rulings excluding testimony proceeded on narrow grounds.

Thus, petitioner's counsel offered certain exhibits (R. 71) "to show that error was committed by the trial judge in allowing these papers to be admitted in evidence when they had been illegally taken from petitioner's private home without a search warrant," and the objection was sustained. Next, petitioner's counsel undertook to prove that the prosecution had put a prostitute on the stand (R. 71–72) "to show that a woman was put on the stand who testified that Mr. Price came to her home and placed a gun against her head and threatened to kill her, and I offer it for the purpose of showing that it was not relevant to the issues involved in the case, and that the Court committed error in overruling the objection by counsel to the admission of this evidence." A colloquy with the bench developed the circumstance that the alleged error occurred during the course of a trial in which petitioner was represented by counsel, and the objection was sustained (R. 72).

Next, petitioner's counsel undertook to prove what a notary public had testified to at the trial (R. 72) "for the purpose of showing that at the trial objection with respect to the relevancy of the evidence was interposed by petitioner's counsel and the objection was overruled, showing that error was committed by the trial court at that time." The objection was sustained (R. 72). Finally, petitioner's counsel asked what the United States Attorney said to the jury regarding the notary public's evidence (R. 72), "to show that error was committed in connection with the notary public's testimony", and the objection was sustained (R. 73).

At the conclusion of the hearing, the district court discharged the writ (R. 88). Petitioner, once more acting *pro se,* moved to vacate the judgment on the ground that no findings or conclusions had been entered (R. 90–91); and his motion to vacate was granted (R. 92). Thereafter, the district court entered findings of fact and conclusions of law (R. 102–106), and again discharged the writ (R. 107). On appeal, its order was affirmed. *Price* v. *Johnston,* 144 F. 2d 260 (C. C. A. 9). The circuit court of appeals pointed out, with respect to the contention of deprivation of counsel at the trial, that petitioner was asked a question after a recess, with his counsel absent; that he objected, saying, "Your Honor, I can't answer questions without being represented by counsel"; that the court then sent

the bailiff to bring the attorney back; and that, after counsel returned, the question was read back and answered in the presence of counsel. 144 F. 2d at 260–261. With respect to the absence of counsel before the U. S. Commissioner, the circuit court of appeals noted that petitioner was "well represented by counsel of his own choosing, secured but four days after his arrest and more than two months prior to trial, and was so represented on arraignment and throughout the trial." 144 F. 2d at 262.

A petition for certiorari, which did not raise any question as to the knowing use of false testimony (Pet. 8), was denied by this Court. 323 U. S. 789, rehearing denied, 323 U. S. 819 (No. 607, Oct. T. 1944).

III. Within the year following final action by this Court on his second petition, petitioner filed a third petition for habeas corpus. This was denied on August 22, 1945, on the ground that the matters raised in the third petition were known to petitioner when he filed the earlier ones, and that they could have been raised in the prior proceedings. *Price* v. *Johnston*, 61 F. Supp. 995, 996 (N. D. Cal.). Leave to appeal *in forma pauperis* was denied (R. 23).

IV. The present proceeding arose upon petitioner's fourth application for a writ of habeas corpus, presented to the United States District Court for the Northern District of California in January 1946, in which he alleged that he was

denied a fair trial in that, on the trial for bank robbery, evidence was presented to show perjury before a notary public, that the court was not justified in imposing a general sentence on the four counts of the indictment, and that the fourth count did not allege an offense (R. 5–7). After an order to show cause was issued (R. 19), petitioner amended his petition to allege (R. 20)—

> That the government knowingly employed false testimony on the trial, to obtain the conviction.

Respondent filed a return to the order to show cause in which he set forth the fact that petitioner's three prior applications had been denied (R. 20–23). Petitioner, in his traverse to the return, repeated the allegations of his original petition (R. 25–26) but merely incorporated by reference the allegation of the amended petition that the prosecutor had knowingly used false testimony (R. 26). The district court denied the petition and discharged the order to show cause (R. 30).

On appeal, a panel of the Circuit Court of Appeals for the Ninth Circuit ordered up the original files in petitioner's three previous applications for habeas corpus, and directed that petitioner be brought before the court for the argument of his appeal (R. 41). After the argument, the submission of the cause was set aside and the case was assigned for hearing before the court en banc (R. 41–42). Petitioner then moved

the court en banc for an order directing his appearance for the reargument (R. 42–43). On January 6, 1947, the court denied the motion (R. 43–44), holding that circuit courts of appeal are without power to order the production of a prisoner for such purpose (R. 44–48). Judge Stephens, concurring, expressed the view that the court had such power, but concurred in the denial of the motion as a matter of discretion (R. 48). Judge Denman filed an opinion, in which Judge Orr concurred, dissenting from the majority's holding that no power existed to grant the relief sought, but without reaching the question of the propriety of exercising the power (R. 48–52).

The appeal was then considered on briefs filed by petitioner and respondent and on oral argument by an Assistant United States Attorney (R. 53). On May 5, 1947, the order of the district court denying the application for the writ was affirmed (R. 66). A majority of the court held that the district court had discretionary power to deny a habeas corpus petition "because of an abusive use of the privilege of the writ through the filing of successive petitions presenting seriatim grounds at all times within the knowledge of the applicant." (R. 53–54.) The majority opinion (R. 53–58) points out that the only new ground urged by petitioner was the bare allegation by way of an amendment to his petition that the prosecution knowingly employed

false testimony to obtain his conviction; that in the district court no facts were set forth to support this conclusion; and that in his brief in the circuit court of appeals, petitioner enlarged on the point only to the extent of referring to the fact that at the trial one witness had changed his testimony after being taken to the district attorney's office (R. 54–55). The majority stated (R. 56):

> On the face of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now. Yet no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions.

The court accordingly held that the case was a proper one for the application of the principle announced by this Court in *Wong Doo* v. *United States*, 265 U. S. 239, 241, that "To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus;*" and that the district court did not abuse its discretion in denying the petition. The majority opinion concludes (R. 57–58):

> * * * Where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ. Conversely, no matter if there have

> been a multiplicity of petitions, grounds newly asserted and seemingly valid must be inquired into if circumstances appear or are fairly shown to excuse the prior failure to assert them. It should be unnecessary to add that even in the absence of such a showing the court may issue the writ and proceed to inquire if in a particular case it is thought that the ends of justice dictate that course. We are not here concerned with a compulsive principle analogous to res judicata, nor with some empty formula to be applied without reflection or as a matter of course. We are speaking rather of a discretionary power resting in the conscience of the judge, to be exercised in light of the circumstances of the particular case and on grounds which square with reason and justice.

Judges Denman and Stephens filed separate dissenting opinions. (R. 58–66.)

After certiorari had been granted by this Court, petitioner on July 14, 1947, moved "for the appointment of counsel to represent your petitioner in this Honorable Supreme Court on the hearing of certiorari", and on October 13, 1947, a member of the bar was duly appointed as such counsel (Journal, Oct. T. 1947, p. 7).

SUMMARY OF ARGUMENT

I. A. Petitioner's contention that the prosecution knowingly used false testimony at his trial shows on its face that it is without merit; and

it is not new. The circumstances surrounding the witness Donner's "change" of testimony and his conference with the United States Attorney were known to petitioner's counsel at his trial, and were the subject of cross-examination of Donner by such counsel. These circumstances were also known to the attorney who represented petitioner in connection with his first petition for habeas corpus, and were advisedly not pressed by him. It is thus apparent that the court below was correct in stating that petitioner knew as much about the alleged misconduct when it occurred as he knows now. Moreover, the papers filed in connection with his earlier petitions for habeas corpus demonstrate the insubstantiality of his present reckless allegation.

B. Even though, in the federal courts, the common law doctrine of *res judicata* does not extend to a decision on habeas corpus refusing to discharge a prisoner, this Court has held that a federal court may base its refusal to discharge on a prior refusal by another court or judge. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239. Petitioner here is seeking to obtain the advantage of the first part of this rule—no *res judicata*—while rejecting the burden of the second part, viz., that controlling weight may be given to the three prior refusals, when, on a fourth petition, nothing not previously available is pre-

sented. There is no sound basis for a conclusion so obviously selective. Decisions by judges of wisdom and fortitude reflect an increasing recognition of the principle that "Even this great writ can be abused, and when the question has once been decided upon full consideration, there must be an end, else the court becomes the puppet of any pertinacious convict." *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 606 (C. C. A. 2), certiorari denied, 323 U. S. 790. And, in fact, even where repeated petitions for habeas corpus have attained some success as a matter of pleading, they have in fact vindicated no rights; a claim for release which lacks merit does not improve through repeated exposure to litigation.

C. The records of petitioner's first three applications were before the court below on the present appeal, though they seem not to have been examined with care, since that court assumed, contrary to the fact, that petitioner's allegations on his fourth attempt raised new matter. But even on that assumption, the decision below was correct; even a new allegation in a later petition must indicate, as a matter of good faith, why it was not earlier made. That requirement was not met here.

1. In the district court, the only ground set up by petitioner which presented an issue cognizable on habeas corpus was his bare allegation

that the Government knowingly employed false testimony in his trial, an allegation which was in no way amplified by reference to any specific facts relating to petitioner's trial. Such mere statement of legal conclusion without any attempt to indicate the supporting facts is insufficient to justify the issuance of the writ, even if the petition were the first application therefor. Of course petitions for writs of habeas corpus "ought not to be scrutinized with technical nicety" (*Holiday* v. *Johnston*, 313 U. S. 342, 350), but there is a vast difference between a statement of specific facts relating to a particular case and the copying of a legal headnote setting forth a general principle in the hope that somehow, by some means unknown to the petitioner or by some recklessness of assertion, his case may be brought within that principle. Particularly in view of the requirement laid down in *Walker* v. *Johnston*, 312 U. S. 275, that issues of fact must go to hearing however improbable they may be on their face, it is important, we submit, that a petitioner show his good faith by setting forth the facts which he expects to be able to prove. Since petitioner failed to meet that requirement in the district court, that court did not err in declining to issue the writ.

2. The circuit court of appeals treated the case as if petitioner had in the district court alleged the facts which he set forth in his brief on appeal.

Those facts were probably sufficient to warrant issuance of the writ if alleged in a first petition. But the court below was justified in holding that something more can legitimately be required when the facts are alleged in a fourth petition rather than in the first.

The opinion below does not hold that the denial of one petition forever precludes the granting of the writ on the same or different grounds, and it in no way encourages the denial of a subsequent petition alleging new grounds discovered after the earlier petitions were determined. It merely imposes the requirement that a petitioner state to the court all the grounds of invalidity of which he is aware at the time he presents his first petition. In this respect it merely reiterates the holding in *Wong Doo* v. *United States*, 265 U. S. 239, 241, that "to reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*."

All that the majority opinion requires is that, in subsequent petitions for the writ, the petitioner set forth enough so that the judge to whom the petition is presented will have some basis for determining whether the applicant is seeking to make an abusive use of the writ. That, we submit, is reasonable judicial administration which in no way curtails the privilege of the writ.

D. The abusive use which can and has been made of petitions for habeas corpus has been causing increased concern to judges and courts and has been for some years past a matter for the attention of the Judicial Conference. The most vexing abuse is the apparently increasing practice of many prisoners of filing successive petitions setting up *seriatim* various attacks on their judgments of conviction. Such successive petitions overburden the courts and, in some instances, may postpone for long periods the will of Congress and the mandate of the courts.

The abusive use of the writ can be curbed without in any way infringing upon the privilege of the writ by requiring petitioners to show their good faith in setting forth facts rather than legal conclusions in their petitions, and by requiring them to explain, when successive petitions are filed, why the new grounds urged were not previously presented.

II. On the subsidiary question of petitioner's right to be brought before the circuit court of appeals to argue his appeal, we think that the court below correctly interpreted the "all writs" provision of Section 262 of the Judicial Code as denying the power to cause petitioner's production for that purpose. The issuance of a writ of habeas corpus to enable a prisoner to conduct his own cause is not "agreeable to the usages and principles of law." No such writ was known to

the common law. The English courts disclaim the existence of any such power as is contended for here, and no American decision supports it.

If it be assumed *arguendo* that the naked power exists, it by no means follows that an order producing the petitioner should have been made here. Section 272 of the Judicial Code, granting to parties the right to "plead and manage their own causes personally," does not require the court to bring before it a prisoner who, because of his conviction, is not free to come and go as he pleases. It may well be that petitioner, by moving this Court to appoint counsel for him here, has waived the point.

If his contention under this heading were sound, it would equally require his transportation from Alcatraz to Washington, under guard and at public expense, to argue the present case. Quite apart from the circumstance that oral argument is not an essential ingredient of due process, as the practice of this Court on motions to dismiss or affirm and on petitions for writs of certiorari graphically demonstrates, the court below was amply warranted, in its discretion, having regard to the potentialities of escape and to the helpfulness or otherwise of a lay prisoner's legal argument, in denying petitioner's application. Certainly in the circumstances of this case no abuse of discretion can be shown.

ARGUMENT

I

PETITIONER'S FOURTH SUCCESSIVE APPLICATION FOR HABEAS CORPUS WAS PROPERLY DENIED WITHOUT A HEARING SINCE IT ALLEGED NOTHING WHICH HAD NOT BEEN PREVIOUSLY KNOWN AND CONSIDERED

A. PETITIONER'S CONTENTION THAT THE PROSECUTION KNOWINGLY USED FALSE TESTIMONY AT HIS TRIAL SHOWS ON ITS FACE THAT IT IS WITHOUT MERIT; AND IT IS NOT NEW

Petitioner's fourth successive application for habeas corpus was amended to allege (R. 20) "That the government knowingly employed false testimony on the trial, to obtain the conviction." No facts to implement this conclusion were brought to the attention of the district court, but in his brief in the circuit court of appeals petitioner stated (R. 55):

> that the United States attorney, in the course of the trial, "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols, and described them, when he could not do so at first."

It is significant that petitioner nowhere alleges that these circumstances, alleged to have occurred

at the time of his trial in 1938, had not been known to him prior to the amendment of his fourth successive petition for habeas corpus in 1946. Nor could he supply any such allegation by further amendment, or, indeed, by averments in a fifth petition; the fact of the matter is, and it is disclosed by the record of his first petition for habeas corpus, that Donner's "change" of testimony and his conference with the United States Attorney, were known to petitioner and to petitioner's counsel at the time of the original trial, and were the subject of forceful cross-examination at the trial by petitioner's counsel. R. 194–196, No. 1081, Oct. T. 1941. All that has been added now is a conclusion, obviously shaped in an endeavor to bring the facts within the head-note of *Mooney* v. *Holohan*, 294 U. S. 103.

The circumstances surrounding Donner's "change" of testimony and his conference with the United States Attorney were known not only to petitioner's counsel at the trial, they were also known to the attorney who represented petitioner in connection with his first petition for habeas corpus. It is now suggested (Pet. Br. 7) that failure to make timely reference to the contention that false testimony was knowingly used simply reflects "petitioner's inartistic and imprecise method of presenting his case", and (Pet. Br. 15) that "petitioner, in his inarticulate and legally imprecise manner, did try to raise" this

ground earlier. It would, we submit, be far more realistic to suggest that in truth the point had no merit then, that petitioner's counsel on his first petition recognized this lack of merit, and that, on the first appeal, when petitioner, once again proceeding *pro se*, complained that counsel had blocked him from amending the petition (R. 213, No. 1081, Oct. T. 1941), he was in effect contending that he knew more law than his lawyer.

It is further significant that, in connection with his second petition for habeas corpus, petitioner abandoned any contention that false testimony had been knowingly used, and that, at the hearing on the second petition, when given an opportunity to enlarge his allegations, he made no mention of the point (*supra*, pp. 11–15). Indeed, apart from the patently frivolous points about lack of counsel, which were adequately disposed of by the appellate opinion (144 F. 2d 260), the hearing on the second petition involved simply attempts to attack collaterally the rulings on evidence made during the course of petitioner's trial.

Examination of the records on petitioner's first two applications for habeas corpus (No. 1081, Oct. T. 1941; No. 607, Oct. T. 1944) makes it abundantly clear that the court below correctly said of petitioner's present amended contention (R. 56),

> On the face of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now.

Examination of those records also makes it abundantly clear that the sentiments expressed in the dissents below, however sound and laudable they may be theoretically,[1] have no substantial relationship to the facts of the present case.

In short, what petitioner now alleges—change of testimony consequent upon a witness's conference with the prosecutor—was known to him and to his counsel at his original trial; it was known to and advisedly disregarded by another lawyer in connection with his first application for habeas corpus; it may well have been known to the lawyer who represented him on his second application; and it shows on its face that it does not support his present reckless contention that

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[1] "* * * this decision establishes a principle hamstringing a wrongfully imprisoned man. It plainly makes it the law for this circuit that a man convicted on perjured testimony procured by a United States attorney, but who does not discover the facts until after he had filed a petition for the writ on another ground, must serve his sentence—here for 65 years" (R. 58).

"In the instant case the cause alleged by petitioner is entirely different from any heretofore alleged. If what petitioner now alleges is true, he was convicted upon perjured testimony suborned by the prosecuting attorney. * * * It may be that he has but recently obtained information which in his opinion will prove his charges. The possibilities are endless, and they should not be denied judicial investigation because all of them seem improbable" (R. 65).

"he was convicted upon perjured testimony subborned by the prosecuting attorney" (R. 65).

B. EVEN WHERE THE DENIAL OF A WRIT OF HABEAS CORPUS IS NOT RES JUDICATA, THE COURTS MAY PROPERLY GIVE CONTROLLING WEIGHT TO THE PREVIOUS DENIAL OF A WRIT WHERE THE APPLICANT MAKES NO SHOWING OF ANY CHANGE OF CIRCUMSTANCES

The rule laid down by this Court is that although the common law doctrine of *res judicata* does not extend to a decision on habeas corpus refusing to discharge a prisoner, a federal court may base its refusal to discharge on a prior refusal by another court or judge. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239.

Thus, in the case first cited, the Court said (265 U. S. at 230–231):

> But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed,—just as when a right to a comprehensive review in criminal cases was given the scope of inquiry deemed admissible on *habeas corpus* came to be relatively narrowed.

> The federal statute (§ 761, Rev. Stats.) does not lay down any specific rule on the subject, but directs the court "to dispose of the party as law and justice may require." A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application. * * *

And in the *Wong Doo* case, the Court stated (265 U. S. at 241):

> It therefore must be held that in this case the courts below erred in applying the inflexible doctrine of *res judicata*. But it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on

> that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. * * *

What petitioner here is seeking to do is obtain the advantage of the first part of the rule, viz., that the three prior rejections do not amount to *res judicata*, and to reject the burden of the second part of the rule, to the effect that those three prior rejections may none the less be given controlling weight when, on a fourth application, petitioner presents nothing that was not available to him earlier.

We submit that there is no sound basis for a conclusion so obviously selective. But because of a tendency in some recent decisions to adopt a similar approach, we think it may be helpful to the Court if we reexamine in some detail the cases dealing with successive applications for habeas corpus.

1. In England, an applicant has the right to apply successively to every judge competent to issue a writ of habeas corpus, and each judge must determine such an application on its own merits regardless of the decision of any other judge or tribunal, even though the grounds urged

are precisely the same. *Ex parte Partington,* 13 M. & W. 679, 684, *per* Parke, B.; *Cox* v. *Hakes,* 15 App. Cas. 506 (H. L.); *Eshugbayi Eleko* v. *Government of Nigeria,* [1928] A. C. 459 (P. C.). But in England there is no appeal from an order discharging the prisoner. *Cox* v. *Hakes, supra.*

2. In the United States, however, where a wider right of appeal became well-nigh universal, a different judicial attitude resulted, evidenced by the case of *Cuddy.* Cuddy was a Los Angeles lawyer who had been sentenced to six months' confinement for contempt of court, viz., tampering with a prospective juror. He petitioned for a writ of habeas corpus; the writ was denied; he appealed; and on appeal the judgment was affirmed. *Cuddy, Petitioner,* 131 U. S. 280. Thereafter he applied for a second writ, on the prior record plus additional matter—petitioner's testimony at the trial of the contempt proceeding—which could have been but was not included on the record on appeal. Mr. Justice Field, sitting on circuit, denied the second application because no change of circumstances was alleged. *Ex parte Cuddy,* 40 Fed. 62 (C. C. S. D. Cal.). He said (40 Fed. at 65–66):

> I return, therefore, to the question whether the petitioner can renew his application for a writ after the decision of the supreme court on his appeal to that tribunal, without first having obtained its leave. If he can renew it on another

record, which may also be in some other particular defective, and so on indefinitely whenever he fails on appeal, it is plain that this writ may often become an instrument of oppression, instead of a means of relieving one from an unjust and illegal imprisonment. The writ of *habeas corpus,* it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs. No appeal or writ of error was allowed there from a judgment refusing a writ of *habeas corpus;* nor, indeed, could there have been any occasion for such an appeal or writ of error, as a renewed application could be made to every other justice of the realm. The doctrine of *res judicata* was not held applicable to a decision of one court or justice thereon; the entire judicial power of the country could thus be exhausted. *Ex parte Kaine,* 3 Blatchf. 5, and cases there cited. The same doctrine formerly prevailed in the several states of the Union, and, in the absence of statutory provisions, is the doctrine prevailing now. In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject. And, in the absence of such legislation, while the doctrine of *res judicata* does not apply, it is held that the officers before whom the second application is

made may take into consideration the fact that a previous application had been made to another officer and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it. I hardly think that an ordinary justice would feel like disregarding and setting aside the judgment of a magistrate like Chief Justice Marshall, or Chief Justice Taney, who had refused an application for a writ after full consideration. In some states an exception is also ingrafted upon the general doctrine where a writ is issued to determine, as between husband and wife, which of the two shall have the custody of their children. In what I have said I refer, of course, to cases where a second application is made upon the same facts presented, or which might have been presented, on the first. The question is entirely different when subsequent occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration. In the present application there are no new facts which did not exist when the first was presented. And under the law of the United States an appeal is allowed to the supreme court where the writ is refused, a provision which would

seem to have been adopted to prevent a second application upon the same facts which were or might have been presented in the first instance. I am of the opinion that in such a case a second application should not be heard, except where the judgment of affirmance by the supreme court is rendered without prejudice to, or with leave to make a new application by, the petitioner. He need not have appealed from the refusal of the district court; he could have applied to the circuit judge, and also, afterwards, to the circuit justice. He did not think proper to pursue that course, but took his appeal to the supreme court, and during the argument there no suggestion was made that the record did not fully disclose the petitioner's case; and when that tribunal decided the case, no request was made for permission to renew the application; and now the imprisonment of the petitioner under the judgment affirmed by that court is drawing to a close; it will expire with this day. This writ must therefore be dismissed, and the prisoner remanded; and it is so ordered.

3. In consequence of Mr. Justice Field's ruling—which, later, was expressly approved in *Salinger* v. *Loisel, supra*, 265 U. S. at 231–232—there have been numerous decisions in the federal courts refusing to entertain later applications for habeas corpus in the absence of a bona fide showing of a change of circumstances. *Dorsey* v.

Gill, 148 F. 2d 857 (App. D. C.), certiorari denied, 325 U. S. 890, overruling *Ex parte Rosier*, 133 F. 2d 316 (App. D. C.); *Rookard* v. *Huff*, 145 F. 2d 708 (App. D. C.); *Pope* v. *Huff*, 141 F. 2d 727 (App. D. C.); *Beard* v. *Bennett*, 114 F. 2d 578 (App. D. C.); *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C. C. A. 2), certiorari denied, 323 U. S. 790; *Slaughter* v. *Wright*, 135 F. 2d 613 (C. C. A. 4); *United States ex rel. Karpathiou* v. *Jordan*, 153 F. 2d 810 (C. C. A. 7), certiorari denied, 328 U. S. 868; *Conley* v. *Pescor*, 157 F. 2d 280 (C. C. A. 8); *Rolfe* v. *Lloyd*, 102 F. 2d 606 (C. C. A. 9); *Swihart* v. *Johnston*, 150 F. 2d 721 (C. C. A. 9), certiorari denied, 327 U. S. 789; *Garrison* v. *Johnston*, 151 F. 2d 1011 (C. C. A. 9), certiorari denied, 328 U. S. 840; *Pagett* v. *McCauley*, 95 F. 2d 839 (Senior Circ. J., 9th Cir.); *Ex parte Moebus*, 148 Fed. 39 (C. C. D. N. H.); *Maniglia* v. *Commander of the Guiseppe Verdi*, 5 F. 2d 680 (D. Mass.), appeal dismissed, 273 U. S. 779; *Mothershead* v. *King*, 37 F. Supp. 210 (W. D. Mo.); *Wheeler* v. *Kaiser*, 45 F. Supp. 937 (W. D. Mo.); *Price* v. *Johnston*, 61 F. Supp. 995 (N. D. Cal.) (present petitioner's third application). Something must appear which could not have been considered on the first application. *Remaley* v. *Swope*, 100 F. 2d 31 (C. C. A. 9). There must be a new point, in a situation where no fair grounds exist for thinking that an abuse of

process is involved. *United States ex rel. Bruno v. Reimer,* 103 F. 2d 341 (C. C. A. 2).

Illustrative of the approach employed by the courts "to prevent an abuse even of a writ of right and freedom" (*Ex parte Kopel,* 148 Fed. 505, 506 (S. D. N. Y.), *per* Hough, D. J.), is the case of *Ex parte Moebus,* 148 Fed. 39 (C. C. D. N. H.), where the petitioner, after unsuccessfully seeking relief in the state courts (*Petition of Moebus,* 73 N. H. 350) and from two federal judges, came, on this third federal attempt, before one of the circuit judges for the First Circuit. Judge Putnam said (148 Fed. at 40–41):

> Also, the petitioner made separate applications to the United States district judge for the district of New Hampshire [Aldrich, D. J.] and to the justice of the Supreme Court of the United States assigned to this circuit [Mr. Justice Holmes], each of which applications was denied. At common law, it was settled that a refusal by any judge to grant a writ of habeas corpus, or a refusal of any judge to discharge from custody a petitioner by, or in behalf of, whom such a writ had been granted, did not constitute res judicata, but that the petitioner was at liberty to apply to any other judge, and so on until the whole series of judges had been exhausted. It is, however, commonly understood that the rule is practically otherwise in those jurisdictions where statutory rights of appeal, or writs of error, have

been granted with reference to such proceedings, and that, either as a rule of law or as a practical rule of administration, no judge would allow a writ when some other judge has refused it; but that any subsequent judge would remit the applicant to his remedy by appeal, or writ of error, unless some substantial change in the circumstances had intervened. In the present case, there has been no such change of circumstances, and, therefore, it may well be that we should have refused to consider this application at all, and should hold the applicant to his remedy by appeal under the statute, with the consequent further holding that, if the statutory time for an appeal had expired, the applicant had lost his rights if he had any. As, however, the petitioner has now for the first time applied to us formally, we have concluded to allow him to complete the circle made up of the justice of the Supreme Court assigned for this circuit, the district judge for the district of New Hampshire, and myself as the circuit judge who ordinarily attends to such matters in that district as come before the circuit judges. We do this more particularly in order that the petitioner may take out his appeal, if he desires so to do, *but with the express statement that no further applications of the character now before us will be entertained by us.* [Italics added.]

Only recently, Judge Learned Hand summed up the same thought more succinctly in one of

the numerous applications made by one of the most litigious of modern prisoners (*United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 605 (C. C. A. 2), certiorari denied, 323 U. S. 790):

> While it is quite true that an order dismissing one writ of habeas corpus does not formally estop the relator from suing out another on the same grounds, that does not mean that he may again and again call upon the court to repeat its rulings. Even this great writ can be abused, and when the question has once been decided upon full consideration, there must be an end, else the court becomes the puppet of any pertinacious convict.

Here, having regard to the staleness of and obvious lack of merit in petitioner's current contention, it is obvious that in essence he is arguing that the courts must, as a matter of constitutional right, perform anew at his bidding.

4. Indeed, the books disclose that the only apparent successes of the most pertinacious of present-day convicts have not served to set them at liberty, that where a repeated application has been cast in terms which have been held sufficient, that circumstance has not enabled the applicant to go free, however much his exercise in pleading may have kindled the hopes of fellow-inmates.

(a) *Waley* v. *Johnston*, 316 U. S. 101, is currently a favored case for the proposition that

one denial is not *res judicata,* and that although "petitioner's allegations in the circumstances of this case may tax credulity" (316 U. S. at 104, cited at Pet. Br. 15), he is none the less entitled to a hearing on his later attempt. But Waley's victory here availed him not; he was unable to prove his improbable contentions, and remained in confinement. *Waley* v. *Johnston,* 139 F. 2d 117 (C. C. A. 9), certiorari denied, 321 U. S. 779, rehearing denied, 321 U. S. 804.

(b) *Hawk* v. *Olson,* 326 U. S. 271, cited at Pet. Br. 19, 20–21, is another case lending support to the proposition that a defeated litigant may profitably try again. But Henry Hawk is still in confinement; this Court only two months ago refused to review the affirmance of a judgment denying him relief. *Hawk* v. *Olson,* 66 F. Supp. 195 (D. Neb.), affirmed *sub nom. Hawk* v. *Jones,* 160 F. 2d 807 (C. C. A. 8), certiorari denied, October 13, 1947 (No. 37 Misc., this Term; Journal, p. 25). And see *Hawk* v. *Olson,* 146 Neb. 875.

(c) *Johnston* v. *Wright,* 137 F. 2d 914 (C. C. A. 9), affirming *In re Wright,* 51 F. Supp. 639 (N. D. Cal.), is an authentic instance of a prisoner who obtained release on his fourth successive writ of habeas corpus. But his victory was indeed a Pyrrhic one. The decision of the Ninth Circuit, just cited, was that his federal sentence, to begin upon the expiration of the

sentence which he was serving in a state penitentiary, was ineffective since it could not commence when he was released from the state institution under a parole order "effective when federal authorities come for him." Wright was accordingly surrendered to the state authorities, and served about ten months more in their custody. He was then recommitted, once more taken into federal custody, and, once again, petitioned for habeas corpus. The writ was once more denied, and the denial was affirmed *per curiam*, the court saying (*Wright* v. *Johnston*, 149 F. 2d 648 (C. C. A. 9)):

> Appellant has made no fewer than eight petitions for writ of habeas corpus in the Federal courts of this jurisdiction. In one of these cases, No. 23647–S, heard before Judge A. F. St. Sure, appellant made the same contention that he makes in the present petition. The court then made exhaustive findings relative thereto. The court found that appellant was not denied the right of assistance of counsel and that he was duly represented by counsel. In the instant case, the lower court on the record herein and the judgments on five other applications for writ of habeas corpus by petitioner denied the present petition. We affirm that judgment.

This Court denied certiorari (326 U. S. 786) and denied likewise two petitions for rehearing (327 U. S. 816, 819). A subsequent motion for leave

to file a petition for a writ of habeas corpus and a subsequent petition for a writ of certiorari to bring up an earlier record were also denied. *Wright* v. *Johnston*, 329 U. S. 803.

In other words, the result of Wright's successful fourth petition for habeas corpus was that he obtained the opportunity to serve some ten months more in state custody before being returned to federal custody—where he now continues.

The fact of the matter is that, absent a real change of circumstances, successive petitions for habeas corpus vindicate no rights. If a petition has merit, it will succeed on the first attempt; if it lacks merit, it is not improved through repeated exposure to litigation.

5. It may be of interest, in the present connection, to review briefly the condition of the authorities in some of the state courts respecting successive applications for writs of habeas corpus.

(a) Some jurisdictions hold squarely that since, unlike the situation obtaining at common law, orders denying petitions for habeas corpus are appealable, they are as much subject to the doctrines of *res judicata* as any other order. That is the law in five states and was the law in one antecedent territory. *Perry* v. *McLendon*, 62 Ga. 598; *Williams* v. *Lawrence*, 193 Ga. 381, certiorari denied, 315 U. S. 816; *State ex rel. Du Fault* v. *Utecht*, 220 Minn. 431;[2] *Williams* v.

[2] *In re Snell*, 31 Minn. 110, cited by petitioner (Pet. Br. 24, 25), is therefore no longer law in Minnesota. See 220 Minn. at 436.

Olson, 145 Neb. 282, certiorari denied, 325 U. S. 877; *McMahon* v. *Mead*, 30 S. D. 515 (following *Ex parte Scott*, 1 Dak. 140); *State ex rel. Durner* v. *Huegin*, 110 Wis. 189, 225–226; *State ex rel. Gaster* v. *Whitcher*, 117 Wis. 668; *Heller* v. *Franke*, 146 Wis. 517.

(b) Five other jurisdictions reach the same result by statute. In West Virginia, a statute makes rulings on habeas corpus *res judicata* in subsequent proceedings. *State* v. *Lowe*, 103 W. Va. 264. The same is true in Florida and Iowa in the absence of a showing of changed conditions. *D'Alessandro* v. *Tippins*, 102 Fla. 10; *State ex rel. Davis* v. *Hardie*, 108 Fla. 133; *State ex rel. Williams* v. *Prescott*, 110 Fla. 261; *Rathbun* v. *Baumel*, 196 Iowa 1233. In Mississippi, a statute makes rulings on habeas corpus *res judicata*. *Ex parte Pattison*, 56 Miss. 161. A second petition will be entertained if new facts are presented (*Ex parte Bridewell*, 57 Miss. 177), but not if the applicant simply tenders new testimony regarding old facts (*Ex parte Nichols*, 62 Miss. 158). In Texas, by statute, a second petition will be entertained only when important new testimony has been obtained which it was not within the applicant's power to produce at the former hearing. *Ex parte Howard*, 107 Tex. Crim. 386; *Ex parte Osborne*, 130 Tex. Crim. 111; see *Ex parte McIntosh*; 147 Tex. Crim. 622.

(c) In four and perhaps five other jurisdictions, where rulings on habeas corpus are not

technically *res judicata,* there is evident an increasing tendency to refuse to consider second applications in the absence of a showing of change of circumstances. The latest decisions of the Supreme Court of California reflect a thoroughgoing disinclination to entertain a second application for habeas corpus where no changes in the facts or the law substantially affecting the rights of the petitioner have been disclosed since the first application. *In re Miller,* 17 Cal. 2d 734; *In re De la Roi,* 28 Cal. 2d 264, 169 P. 2d 363.[3] In Oklahoma, "where an application for writ of habeas corpus has been denied, this court will not ordinarily entertain a subsequent application for a writ based on the same grounds and the same facts, or any other grounds or facts existing when the first application was made, whether presented then or not." *Ex parte Davis,* 74 Okla. Crim. 75, 76; *Ex parte Gray,* 74 Okla. Crim. 200; *Ex parte Berrie,* 75 Okla. Crim. 115; *In re Seale,* 76 Okla. Crim. 164; *In re Edwards,* 79 Okla. Crim. 259.[4]

The rule in Tennessee seems to be that a second writ will be denied on the authority of the first denial, in the absence of new evidence, even though *res judicata* as such does not apply. *State*

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[3] The earlier California cases cited by petitioner (Pet. Br. 24) no longer represent the law there.

[4] The earlier Oklahoma cases cited by petitioner (Pet. Br. 24) does not reflect the practice in that State.

ex rel. Conner v. *Hebert,* 127 Tenn. 220; *State ex rel. Guy* v. *Foster,* 160 Tenn. 285. In Pennsylvania the courts stress that the remedy for a denial of habeas corpus is by appeal, not by a new application to another court. The second petition will be denied by the Supreme Court where the first was denied by the Superior Court. *Commonwealth ex rel. Nedeau* v. *Ashe,* 342 Pa. 46; *Commonwealth ex rel. Orlando* v. *Smith,* 346 Pa. 42. Similarly, the later petition will be denied by the Superior Court where the first petition had earlier been denied by the Supreme Court (*Commonwealth ex rel. Lewis* v. *Ashe,* 142 Pa. Super. 357; *Commonwealth ex rel. Penland* v. *Ashe,* 160 Pa. Super. 316, 51 A. 2d 347), or where the first petition had been denied by a Court of Common Pleas (*Commonwealth ex rel. Jackowski* v. *Fluck,* 147 Pa. Super. 434), or where two prior petitions had been denied, respectively, by the Superior and Supreme Courts (*Commonwealth ex rel. Foster* v. *Ashe,* 146 Pa. Super 482).

The judicial approach in New Hampshire is illustrated by the second petition filed in the Supreme Court of that state by Henry Moebus, the same who had also unsuccessfully applied to three federal judges—District Judge, Circuit Judge, and Circuit Justice (*supra,* pp. 38–39). He was similarly unsuccessful on his second application to the state court. That tribunal said (*Petition of Moebus,* 74 N. H. 213, 214, 215):

> It is not alleged that anything has occurred since that decision [*Petition of Moebus,* 73 N. H. 350] affecting his legal status; so that the question presented upon this petition, having been determined against him by the former judgment, cannot be again litigated as a matter of right. * * *
>
> The petitioner is bound by that decision, which is followed and reaffirmed, with the suggestion that repeated applications for a writ of *habeas corpus* introducing no new facts material to the issue will ordinarily be summarily disposed of.

This review of the state cases indicates that petitioner has perhaps too selectively read the authorities when he states (Pet. Br. 24, n. 4), "The majority view in state courts seems to be that even the same ground may be relitigated in a hearing on a subsequent petition." In three of the eleven jurisdiction cited by him, as we have shown, notes 2–4, *supra,* the law is now the other way. In three additional jurisdictions on which he relies, decisions on habeas corpus are not appealable, so that the reason for not permitting relitigation is not present. *In re Forest,* 45 N. M. 204; *In re Pyle,* 72 Mont. 494, 497; *Brugneaux* v. *Dankowski,* 51 Wyo. 103. It follows that, as against the remaining five states which petitioner cites, respondent can point to fourteen which support a contrary view.

And, we submit, the better reason is on our side. Some of the supporting considerations are those already set out in the federal cases, quoted *supra,* pp. 30–40, 42.[1] But there are illuminating discussions in the state reports as well, and we think that the rationale supporting the refusal by a state court to entertain a fourth successive writ for habeas corpus was never better stated than by Mr. Justice Bleckley of the Supreme Court of Georgia in the case of *Perry* v. *McLendon,* 62 Ga. 598, *supra:* The rugged common sense of his opinion warrants, in our view, extended quotation (62 Ga. at 604–605):

> A single judgment will serve to hang a man, if left to stand unreversed. He cannot have trial after trial to ascertain if he is guilty, and determine whether he is to be executed. One complete trial, fair and legal, will carry him out of the world; and why should it not suffice to keep him in jail until some new right to a deliverance has arisen? Is the same alleged right to be investigated over and over, each time afresh, just as if no prior investigation had taken place? Is the grievance, real or supposed, of a prisoner the stone of Sisyphus which courts can never bring to a place of rest? and if called to lift it up

[1] It is significant that petitioner does not mention, let alone discuss, the numerous authorities in the lower federal courts which hold contrary to his contentions.

the same hill as often as it rolls down, must they comply? Doubtless there is an obligation to issue the writ of *habeas corpus* whenever, and as often as, it may be applied for, provided the petition contains the requisite matter, is in due form, duly authenticated, duly presented, and does not show on its face that the imprisonment, though complained of as illegal, is in fact legal. Code, § 4012. But when it appears, on the return or at the hearing, that the legality of the imprisonment has already been adjudicated upon a previous writ between the same parties, by a competent tribunal, the production of that judgment is the end of controversy. Further writs may be applied for and issued, but to each and all of them the one valid and subsisting judgment will be a conclusive answer, as to any and all objections to the legality of the restraint which were embraced in the first petition, or which could and should have been embraced in it. The effect of a judgment cannot be avoided by a difference in the pleadings, when those in the first case could and should have been as full as those in the second, though in fact they were not. No party, plaintiff or defendant, is permitted to stand his case before the court on some of its legs, and if it falls, set it up again on the rest in a subsquent proceeding, and thus evade the bar of the former judgment. It is the body of a case and not certain of its limbs

only, that the final judgment takes hold upon. Whoever brings the legality of an imprisonment into question by writ of *habeas corpus,* should, in the first instance, show as much cause for his attack as he can. He must discharge all his weapons, and not reserve a part of them for use in a future reencounter. He must realize that one defeat will not only terminate the campaign, but end the war.

C. EVEN A NEW ALLEGATION IN A LATER PETITION FOR HABEAS CORPUS MUST INDICATE, BY WAY OF EARNEST OF GOOD FAITH, WHY IT WAS NOT EARLIER PRESENTED; AND THAT REQUIREMENT WAS NOT MET IN THE INSTANT CASE

Although the records of petitioner's first three applications were before the court below on the hearing of the present appeal (R. 41), they seem not to have been examined with any care, as the majority and dissenting judges all assumed that petitioner's allegations on his fourth attempt raised new matter. But, even on that assumption, which, as we have already shown (*supra,* pp. 26–30), is without foundation, the decision below was correct.

1. The fourth petition for habeas corpus failed to allege sufficient facts to warrant the issuance of the writ by the district court

It is not suggested here that petitioner's fourth petition for habeas corpus, as originally filed (R. 5–7), alleged any grounds which would require issuance of the writ. Petitioner's allegations of

error in the course of the trial clearly stated no grounds cognizable on habeas corpus, and his attack upon the validity of the fourth count of the indictment was obviously without merit, and had, in addition, been adjudicated against him on his second petition for a writ. Thus, the only allegation before the district court which could even remotely be held to raise an issue requiring a hearing was the bare allegation in his amended petition (R. 20)—

> That the government knowingly employed false testimony on the trial, to obtain the conviction.

In the district court, that allegation was in no way amplified by reference to any specific facts relating to petitioner's trial.

Such a bare allegation of a legal conclusion without any attempt to indicate the supporting facts is insufficient to justify the issuance of the writ, whether the petition be the first or the twentieth application therefor. The courts have so held, and, we submit, rightly so. *Hodge* v. *Huff*, 140 F. 2d 686, 688 (App. D. C.), certiorari denied, 322 U. S. 733; *Long* v. *Benson*, 140 F. 2d 195, 196 (C. C. A. 6), certiorari denied, 322 U. S. 732. In this connection, we think the time has come to reemphasize the rule, early laid down by this Court and frequently repeated since, that mere general allegations of conclusions of law, without facts to support them, are insufficient

to warrant the issuance of the writ. *Cuddy, Petitioner,* 131 U. S. 280, 286; *Kohl* v. *Lehlback,* 160 U. S. 293, 299; *United States* v. *Ju Toy,* 198 U. S. 253, 261; *Collins* v. *McDonald,* 258 U. S. 416, 420. We do not by this suggestion mean to question the later rulings of this Court which hold that petitions for writs of habeas corpus "ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston,* 313 U. S. 342, 350; see also *Tomkins* v. *Missouri,* 323 U. S. 485, 487; *Pyle* v. *Kansas,* 317 U. S. 213, 216. But there is a vast difference between an inartistic statement of specific facts relating to a particular case and the copying of a legal headnote setting forth a general principle, such as the principle that the denial of assistance of counsel or the knowing use of perjured testimony are adequate grounds for discharge on habeas corpus. Particularly in view of the statutory requirement emphasized by this Court in *Walker* v. *Johnston,* 312 U. S. 275, that issues of fact must go to hearing however improbable they may be on their face, it is important, we think, that a petitioner show to the court to which the petition is presented that there is a real issue of fact arising in his case, and that he is not merely invoking the process of the court in a wishful—or, as here, reckless—attempt, somehow, by means not clearly known to him, to bring his case within some prior decision. True, laymen

need not be held to the standards of technical proficiency required of lawyers. But a layman who can write English can as easily—indeed, more easily—present the facts as he knows them, than he can advance legal conclusions. If a petitioner expects to prove that perjured testimony was used against him, he must know the nature of the alleged perjury and the significance of that testimony at his trial. There is no infringement of the writ in a requirement which would compel an applicant to state to the court, however crudely, the nature of such perjury, the significance of the testimony, and the reasons for his belief that the prosecutor was a knowing party thereto. After all, the habeas corpus statute itself requires the allegation of facts. See R. S. 754 and 760, *supra*, pp. 3–4. We are not insisting that a lay applicant for the writ be held to a standard of clear proof of a *prima facie* case, but we do think that he should be required to allege enough to show that he is advancing a genuine issue of fact. We do not demand legal artistry; we ask only a showing of good faith.

On this basis, we submit, petitioner's bare allegation in the district court that the prosecutor had knowingly used false testimony failed to state a cause of action. On the part of the district judge, therefore, there was clearly no error in the denial of the writ.

2. Considering the petition as amplified by petitioner's brief in the circuit court of appeals, the court was warranted in denying petitioner's fourth application because of his failure to show good faith

The circuit court of appeals treated the case as if petitioner had alleged in the district court the facts set forth in his brief in the circuit court of appeals, to the effect that the United Stafes Attorney, in the course of the trial—

> * * * "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols and described them, when he could not do so at first." * * * (R. 55.)

It is a little difficult to understand how a district court can be held to knowledge of statements never brought to its attention. However, since the circuit court of appeals did consider the case as if those facts had been alleged in the district court, we too, shall treat the case as if it were in that posture.

We assume under this heading that the facts set forth in petitioner's brief would, if alleged in a first petition for habeas corpus, have been sufficient to meet the requirements to which we have adverted just above, and thus would have

been sufficient to require the issuance of the writ. The question thus is whether a court, in the exercise of its discretion, may require something more when those facts are set forth in a fourth petition, rather than the first—a fourth petition filed eight years after the judgment of conviction, and five years after the first petition.

It is important in this connection to note just what the majority decision below does and does not hold. As appears from the concluding portion of the majority opinion below which we have quoted at pp. 18–19, *supra*, the majority does not hold, as the dissenting judges apparently assume, that the denial of one petition forever precludes the granting of a subsequent petition alleging the same or different grounds. It clearly recognizes that, where a petitioner does show to the court that grounds asserted in a later petition were unknown at the time the earlier petition was filed, the court would be required to issue the writ. It also recognizes that, where a petition makes a real showing that the proceedings which led to conviction were invalid, then the denial of numerous prior petitions would not in itself justify refusal to grant the writ and order a hearing. The majority decision below leaves the way clear for that result in any proper case. It thus in no way conflicts with the holdings of this Court in such cases as *Hawk* v. *Olson*, 326 U. S. 27, and *Waley* v. *Johnston*, 316 U. S. 101, where hearings were directed although prior petitions

had been denied. That the district judges sitting in the Ninth Circuit have so recognized is shown by the fact that, following the decision of the Ninth Circuit in *Swihart* v. *Johnston,* 150 F. 2d 721, certiorari denied, 327 U. S. 789, in which a panel of the circuit court of appeals laid down the rule enunciated in the majority opinion below, a district court ordered the discharge of a prisoner on a writ of habeas corpus alleging denial of assistance of counsel, even though the issue had previously been litigated on prior writs of habeas corpus. *McDonald* v. *Johnston,* 62 F. Supp. 830 (N. D. Calif.). The solicitude of the district judge to preserve the rights of the prisoner is strikingly illustrated by the fact that his order of discharge was based on grounds subsequently held insufficient by the circuit court of appeals with the result that his order was reversed. *Johnston* v. *McDonald,* 157 F. 2d 275 (C. C. A. 9), certiorari denied, 329 U. S. 795.

All that the decision below requires is that a person who makes a fourth application for a writ establish his good faith by explaining to the court why the facts presently urged were not previously presented to it. There is no real curtailment of the writ in that ruling which, as we view it, merely seeks to impose the requirement that, in general, a petitioner state to the court all the ground of invalidity of which he is aware at the time he presents his first petition.

Petitioner seems to argue (Pet. Br. 14, 25–26) that it was somehow the duty of the United States Attorney or of the trial court to have called on him to explain why, although represented by counsel at his first two attempts at release, he did not earlier make more clear his present claim. But it is not the law that mere general allegations of illegal confinement are sufficient to shift the burden of proof on the respondent jailer. See cases cited *supra*, pp. 51, 52. Quite to the contrary, the burden when a judgment of conviction is collaterally attacked is on the petitioner. *Johnson* v. *Zerbst*, 304 U. S. 458, 468–469; *Hawk* v. *Olson*, 326 U. S. 271, 279.

It is an abuse of process to require successive hearings and successive productions of witnesses in court when the facts were at all times in the knowledge of petitioner and capable of being litigated in one proceeding—a circumstance which the present proceeding emphasizes, since here, as we have shown (*supra*, pp. 6–11, 26–30), the facts relied upon were known to petitioner and to his counsel at the original trial. Very frequently the judgment attacked by a writ of habeas corpus may have been rendered in a court many miles away from the place of incarceration. Normally, the witnesses whose testimony will be required are the presiding judge, the United States Attorney and the court clerk, also many miles away. It is to the advantage of everyone, the court, the United States Attorney, and petitioner himself that the

full testimony of these witnesses be obtained at one time and not at two, five, or twenty separate occasions. As this Court said in *Wong Doo* v. *United States*, 265 U. S. 239, 241, "To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*." In the *Wong Doo* case the grounds relied upon in the second petition were set forth in the first but not pressed at the hearing. The same is true here, but the situation would be no different if grounds known to petitioner at the time of the first hearing were withheld by not being alleged at all. Consequently there is no occasion for acceding to petitioner's present suggestion (Pet. Br. 18) that the habeas corpus court should determine, as an issue of fact, upon hearing, whether there has been an "apparent husbanding" of grounds. The facts appear very plainly from the records of petitioner's successive applications, and the matter was properly and adequately determined on the order to show cause (R. 19, 30).

An excellent illustration of just how abusive the practice of requiring the courts to hold successive hearings on successive applications for habeas corpus may be appears in the recent decision of the District Court of Kansas in the case of *Casebeer* v. *Hudspeth*, decided July 24, 1947 (Appendix, *infra*, pp. 89–92). Casebeer was convicted of bank robbery in 1936, and his conviction was affirmed on appeal, *Casebeer* v. *United States*, 87

F. 2d 668 (C. C. A. 10). On a petition for habeas corpus he was given a full hearing at which the testimony of a number of witnesses was taken. The writ was discharged and the order of discharge was affirmed on appeal, *Casebeer* v. *Hudspeth*, 121 F. 2d 914 (C. C. A. 10). A petition for a writ of certiorari was denied by this Court, 316 U. S. 683. Thereafter, Casebeer filed two motions to correct the record, a mandamus proceeding which went to hearing, and four petitions for writs of habeas corpus. In his fifth petition for a writ of habeas corpus, he alleged the knowing use of perjured testimony by Government officials. A hearing was had which lasted for eight days and at which the testimony or depositions of 20 witnesses were produced. At the end, the court found that his allegations of conspiracy to use perjured testimony were not sustained; that on the contrary—

> * * * petitioner's suppositions in this regard are nothing more than fantasy of a crass variety and entirely without support of credible evidence.

Granted that the courts, in the interest of preserving the privilege of the writ, cannot escape from being required to hold hearings caused by the "fantasy of a crass variety" of imaginative prisoners, must their time be taken up with extended hearings every time that crass fantasy takes a new turn? If a petitioner has once been proved to be a gross perjurer, must his every allegation be accepted as true?

Here, as we have shown, every "fact" now relied upon was known before the jury convicted petitioner. The differences between the facts brought out by petitioner's counsel at the trial during his cross-examination of the witness Donner (*supra*, pp. 7–10) and petitioner's present assertions in his brief (R. 55) are perhaps only the product of nostalgic improvement over a period of eight years, though assuredly petitioner's credibility is not enhanced by the circumstance that, as he himself admitted under oath, he had, prior to his present conviction, been convicted of felonies in West Virginia, Texas, Indiana, and of a violation of the Dyer Act in an unspecified federal court (R. 63, 80, No. 607, Oct. T. 1944). All that has really been added here, apart from some slight embroidery, is a headnote—and that, as we have already pointed out above, pp. 50–53, is insufficient.

Nor are we obliged here to speculate as to the truth or untruth or inherent probability of either the embroidery or of the new headnote. The portion of the record of trial included in the pleadings in the first petition for habeas corpus shows, not only that what petitioner has now conjured up did not in fact happen, but also that the lawyer who represented him in connection with that first petition found no substance in the notion and so did not press it. In these circumstances, clearly, petitioner's present allegations

do not raise any issue of fact which needs to be tried.

A court has not only the right, it has the duty to lay down reasonable requirements designed to assure itself that one who invokes the great remedial writ of habeas corpus does so in good faith, and not, as here, simply in the course of making a reckless assertion. To that end, it may, we think, as the decision below suggests, require that in subsequent petitions for the writ, an applicant set forth the fact that he has made previous applications and give some explanation of his failure to urge the new grounds in his earlier petition. As this Court said in *Salinger* v. *Loisel*, 265 U. S. 224, 232:

> * * * As a further safeguard against abuse the court, if not otherwise informed, may on receiving an application for the writ require the applicant to show whether he has made a prior application and, if so, what action was had on it.

The dissenting opinions below urge that petitioner may not have learned of the prosecutor's alleged implication in the perjury until after the denial of the earlier petitions. The earlier records show that such is not the case here. But if it were, then petitioner would have no difficulty in so stating, and nothing in the majority opinion would require or encourage a district court to deny the writ, if such were the fact. All that the majority opinion requires is that, in subsequent

petitions for the writ, the petitioner set forth enough so that the judge to whom the petition is presented may have some basis for determining whether the new petition is invoking the aid of the courts on some genuine ground theretofore not urged for some good reason, be it lack of knowledge of the facts or of the law. The majority opinion does not bar relief to a person who can show that, even though he knew the facts earlier, he did not understand their significance, and therefore did not urge them. It does not bar relief where a prior decision is shown to have been wrong. As we read the majority opinion below, it does no more than require an applicant for successive writs of habeas corpus to show that he has not deliberately, in bad faith, held back information known at the time of the prior proceeding. It does not prevent resort to the writ, it merely requires a showing of good faith. That, we submit, is reasonable judicial administration which in no way curtails the privilege of the writ.

D. THE ABUSIVE USE OF SUCCESSIVE PETITIONS FOR WRITS OF HABEAS CORPUS HAS BECOME A SERIOUS PROBLEM IN JUDICIAL ADMINISTRATION

The present case involves a serious problem in judicial administration which extends far beyond the particular facts here presented. Essentially, that problem is how to preserve the function of the writ of habeas corpus as the great instrument of right and freedom and yet to protect the courts

from being harassed with swarms of unmeritorious and frivolous petitions which not only burden them to no avail but which may indefinitely delay the due administration of the laws of the land.

The abusive use which can and has been made of the writ of habeas corpus has become the subject of increasing concern to courts and judges. What petitioner characterizes as "the bugaboo of a flood of petitions for writs of habeas corpus" (Pet. Br. 24), has in fact been a matter for the attention of the Judicial Conference at six successive meetings. *Report of the Judicial Conference,* 1943, pp. 22–24; *id.,* 1944, p. 22; *id.,* 1945, p. 28; *id.,* 1946, p. 21; *id.,* April 1947, p. 46; *id.* Sept. 1947, pp. 17–18.* The specific difficulties arising in particular jurisdictions are documented, with respect to the situation obtaining at Alcatraz, not only in the decision below (R. 57) but also in a recent address by Judge Goodman of the Northern District of California, *Use and Abuse of the Writ of Habeas Corpus,* 7 F. R. D. 313. Similar problems in the District of Columbia were the subject of exhaustive treatment by the Court of Appeals in *Dorsey* v. *Gill,*

* It may be noted that draft Section 2244 of the Judicial Conference's most recent proposal (Sept. 1947 *Report,* p. 18), is simply a restatement of the rule, discussed above at pp. 30–40, that on a second or later application for habeas corpus a federal judge may give controlling weight to a prior denial on the same grounds.

148 F. 2d 857 (App. D. C.), certiorari denied, 325 U. S. 890.

We set out below, pp. 66–69, some of the statistics set out in that decision and Judge Goodman's address which illustrate the extent of the problem. And, with the aid of the United States Attorneys in the districts involved, we have undertaken to supplement those figures with statistics in regard to habeas corpus petitions in three districts where important federal penitentiaries are located—the Northern District of Georgia, embracing Atlanta Penitentiary, the District of Kansas, covering Leavenworth Penitentiary, and the Northern District of California, where Alcatraz is situated.

Atlanta Penitentiary has an average prison population of about 2,000. The United States Attorney has sent us the following figures in regard to habeas corpus petitions in that district:

Atlanta

Year	Number of petitions filed	Number of hearings *	Number of discharges
1937	205	149	32
1938	123	111	9
1939	63	55	3
1940	75	66	6
1941	65	59	7
1942	103	97	10
1943	139	137	9
1944	114	112	6
1945	96	96	2
1946	52	52	0
Total	1,035	994	84

* It has been proved impossible to distinguish between hearings on orders to show cause and hearings on the writ since, in many instances, witnesses are heard on orders to show cause and legal questions alone are determined on hearings after the writ has issued.

For Leavenworth, which has an average prison population of approximately 2,000, the figures are as follows:

Leavenworth

Year	Number of petitions filed	Number of hearings	Number of discharges
1938	44	42	2
1939	51	49	2
1940	57	56	
1941	64	59	3
1942	45	42	3
1943	64	57	5
1944	46	40	
1945	39	30	3
1946	46	43	1
1947 (to Ju 30)	53	47	3
Total	509	466	21

From Alcatraz, with an average prison population of only approximately 250, there are almost as many petitions as from the much larger penitentiary at Leavenworth. The figures for that prison are as follows:

Alcatraz

Year	Number of petitions filed	Number of discharges *
1937	14	
1938	29	
1939	74	2
1940	27	2
1941	35	1
1942	29	3
1943	40	4
1944	31	1
1945	36	1
1946	27	
1947	36	
Total	368	14

* We do not have the figures as to the number of cases which went to hearing, partly because in this district, before the decision of this Court in *Holiday* v. *Johnston*, 313 U. S. 342, hearings were held before a Commissioner rather than before the court.

These figures reveal that, although the majority of petitions contain allegations which require some form of hearing, more than 95 percent of the petitions filed prove on examination to be without merit.[1] Yet many of the cases involve lengthy hearings which require the testimony or depositions of judges, United States Attorneys, and court clerks, often miles away from the place of hearing.

Nor is that the end of the problem. More vexing than the flood of frivolous petitions is the practice of many prisoners of filing successive petitions setting up *seriatim* various attacks on the judgment of conviction. From Atlanta during the past 10 years, 36 petitioners filed 2 petitions, 9 filed 3, 2 filed 4. Out of Leavenworth, 39 petitioners filed 2 petitions, 11 filed 3, 2 filed 4, 1 filed 5, and 1 filed 7. In Alcatraz, understandably enough perhaps, prisoners have been even more diligent. Judge Goodman reports (*Use and abuse of the Writ of Habeas Corpus*, 7 F. R. D. 313, 315):

> The most common abuse in this district is the filing of successive petitions by inmates of Alcatraz Prison. During the past ten years, 180 Alcatraz inmates filed 368

[1] The situation is not substantially changed by appellate review. The United States Attorneys inform us that appeals by petitioners are seldom successful, and that in the years from 1938 to the present, not more than two appeals a year by petitioners in each district resulted in reversals, and that in many years no reversals have been obtained by petitioners.

petitions for the writ in our court, which would, at first blush, appear to be an average of about two petitions to one inmate. But that is not the real picture. 117 inmates filed one petition each. The remaining 63 filed 251 petitions. And when we break down these figures, we find that 26 inmates filed 167 petitions. And a further analysis discloses that one inmate filed 16 successive petitions, one man filed 15 successive petitions, one filed 14 petitions, one filed 9 petitions, etc. A complete tabulation is set out in the margin.* Most of the recent Supreme Court pronouncements arise out of these petitions.

*[Footnote from original.] Alcatraz habeas corpus petitions filed from Jan. 1, 1937 to June 18, 1947.

Number of petitioners	Number of petitions filed	Total number of petitions filed
1	16	16
1	15	15
1	14	14
1	9	9
2	7	14
5	6	30
9	5	45
6	4	24
10	3	30
27	2	54
117	1	117
180	----------	368

Even more persistent litigants have appeared in other circuits. In *Slaughter* v. *Wright*, 135 F. 2d 613 (C. C. A. 4), the court had before it a prisoner who had filed 18 prior applications for a writ. As reported in *Dorsey* v. *Gill*, 148

F. 2d 857, *supra*, one person in the District Court filed 50 petitions, and four others more than 20 each. And the Court of Appeals pointed out (148 F. 2d at 862–863):

> Today, in the District of Columbia, * * *, petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions—an average of 5. The extent of the problem is indicated by the table appended in the margin, which shows a growth of filings in the District Court from 32 in the fiscal year 1934 to 276 in 1944; and 101 petitions filed during the first four months of the fiscal year 1945 (July to October, inclusive, 1944). Moreover, it should be noted that the total of 635 petitions filed between July 1941 and October 1944, inclusive, does not include 180 petitions presented, but denied filing. The number has increased most rapidly during the last three years, since the Supreme Court's decision in Walker v. Johnston [312 U. S.

275], and since one of the opinions filed in this Court in the Rosier case [133 F. 2d 316], admonished the District Court that: "Administrative inconvenience, even occasional abuse of the facilities of the courts, is but a small price to pay for the precious right of access to the courts guaranteed under our system of government *to all who claim to be wronged.* [Italics supplied.] Thus, if all petitions presented during this period of three and one-third years had been filed and writs issued, as is the practice in some districts, the judges of the District Court would have been required to hold 815 hearings upon returns made, in each instance, by the custodial officers in whose control these persons were held.

Perhaps the most flagrant instance of an abusive use of the writ of habeas corpus is that of Gene McCann, who, after conviction, filed almost a thousand applications in the District Court for the Southern District of New York, and delayed entering upon service of his sentence for five years after his conviction. See Memorandum for Respondent in *McCann* v. *Clark,* 331 U. S. 813 (No. 340, Oct. T. 1946).

With respect to persons who have commenced service of prison sentences, even the filing of numerous successive petitions for the writ may not in and of itself have the effect of defeating the administration of justice, although it is not unknown for prisoners to use the opportunity of

their appearance in court on a writ of habeas corpus to attempt an escape. E. g., *Bayless* v. *United States,* 141 F. 2d 578 (C. C. A. 9), certiorari denied, 322 U. S. 748. In other situations, however, an unrestricted, repetitious use of the writ may result in postponement for long periods of the operation of the will of Congress and the mandate of the courts. A striking example of this result is found in deportation cases, where, in numerous instances, aliens found deportable in accordance with established procedure have for years delayed execution of the deportation orders by successive legal actions. For example, a group of enemy aliens were, after hearing, ordered removed by individual orders issued in the period from October 1945 to April 1946. The constitutionality of the Alien Enemy Act, under which the deportation orders were issued, was sustained by the Court of Appeals on May 6, 1946, *Citizens Protective League* v. *Clark,* 155 F. 2d 290 (App. D. C.), and certiorari was denied by this Court on December 9, 1946, 329 U. S. 787. In December 1947, two years after some of the orders had been issued, many of those persons are still in this country, having in the meantime filed a new injunction proceeding and two successive petitions for writs of habeas corpus. See Memorandum in Opposition to Petitioners' Application for a Stay in *Ahrens* v. *Clark,* No. 446, this Term. See also

Wong Doo v. *United States*, 265 U. S. 239, 241, where this Court noted that the alien had succeeded in delaying his deportation for four years.

It is evident, therefore, that the courts as a whole, and particularly the courts in districts in which large federal penitentiaries are located, are confronted with a serious problem arising from an abusive use of the writ of habeas corpus by unscrupulous prisoners.[8] If an attempt to curb that abuse would result in any substantial curtailment of the great privilege of the writ, it would be easy to agree with the statement in *Ex parte Rosier*, 133 F. 2d 316, 332 (App. D. C.), that

> Administrative inconvenience, even occasional abuse of the facilities of the courts, is but a small price to pay for the precious right of access to the courts guaranteed under our system of government to all who claim to be wronged.

But generalized exhortations do not settle concrete problems of where to draw a line. We think the controlling considerations were more realistically set forth in Mr. Justice Rutledge's dissent in the *Rosier* case, where he said (133 F. 2d at 333):

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[8] "We also receive from Alcatraz inmates many and successive applications for the writ praying us to require the Warden to allow petitioners to receive newspapers, to send for law books, to circularize Congressmen, to keep birds, to change lavatory facilities, to cease censoring prisoner's correspondence and many others too numerous to mention." Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F. R. D. 313, 316.

> Individual freedom, of course, is paramount to mere administrative convenience, expediency and efficiency in operation of the courts and other governmental agencies. Habeas corpus is the historic instrument for preserving it. But adequate protection does not require a litigious capacity of such nuisance value that hearings must be had repeatedly upon the same issue in the petitioner's uncontrolled and unlimited choice. There must be some limit to the frequency with which he can force the court to determine and redetermine his sanity. I think therefore that the controlling issues in the case are, What is that limit? Has it been exceeded on these facts?

That the limit had been exceeded is shown by the circumstance that the *Rosier* decision was soon specifically overruled in *Dorsey* v. *Gill*, 148 F. 2d 857, 864, *supra*. Thus the Court of Appeals held that the abuse may be curbed without substantial infringement of the privilege of the writ.

The method of correction is, in the normal case of a repeated application, a fairly summary disposition on the basis of the prior adjudication. That has been the method traditionally used, see pp. 30–40), *supra*, by judges whose regard for liberty was not less because they evidenced sufficient fortitude to refuse to act "the puppet of any pertinacious convict." And, where a genuinely new ground is asserted in a later application, then the method of correction is that suggested by the opin-

ion below, viz., that the applicant who repeatedly invokes the writ must, by way of earnest of good faith, show either a change of circumstances or some reason why the matters alleged could not previously have been presented.

There is no deprivation of liberty or constitutional right in such rulings.

II

PETITIONER WAS NOT ENTITLED AS OF RIGHT TO BE BROUGHT BEFORE THE CIRCUIT COURT OF APPEALS TO ARGUE HIS APPEAL

As we have indicated in the Statement, *supra*, pp. 16–17, petitioner moved in the circuit court of appeals for an order directing the warden to produce him before that court in order to enable him to argue his appeal (R. 42–43). A majority of the court below were of the opinion that the court was without power to grant the motion (R. 44–48). Judge Stephens expressed the view that the power existed but that the motion should be denied as a matter of discretion (R. 48), and Judges Denman and Orr dissented from the holding that no power existed without reaching the question of the propriety of exercising such power (R. 48–52). After certiorari was granted, petitioner moved this Court for the appointment of counsel to represent at the hearing, and counsel was duly appointed.

We think the court below correctly interpreted the "all writs" provision of Section 262 of the

Judicial Code (*supra*, p. 3) as denying the existence of any power to issue an order for the production of a prisoner to enable him to argue his appeal in person. While the word "necessary" in that Section is not to be restricted "in the sense that the court could not otherwise physically discharge its appellate duties" (*Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 273), the provision concludes with the phrase, "agreeable to the usages and principles of law." And the issuance of a writ of habeas corpus to produce a prisoner to enable him to argue his appeal is, as the court below rightly held, not "agreeable to the usages and principles of law" (R. 46–47).

It is not contended here, nor could it be, that a writ of habeas corpus for this purpose was known to the common law. See *Ex parte Bollman*, 4 Cranch 74, 95–96; 3 Bl. Comm. *129–132. And it is significant that in England, in the course of the Nineteenth Century, the courts held that they had no power to grant a habeas corpus to bring up a party in custody to enable him to conduct his causes in person. The earlier decisions reflect some uncertainty as to whether the denial was properly based upon a lack of power (*Attorney General* v. *Hunt*, 9 Price 147; *Ford* v. *Nassau*, 9 M. & W. 793) or upon discretionary grounds (*Ex parte Cobbett*, 3 H. & N. 155; *Clark* v. *Smith*, 3 C. B. 982). Later, however, in *Benns* v. *Mosley*, 2 C. B. N. S. 116, where the judges of the Court

of Common Pleas conferred with the judges of the Courts of Queen's Bench and Exchequer before delivering judgment, all concurred in saying that "we have no power to do that which is asked" (2 C. B. N. S. at 116). That has been the law of England ever since (*Weldon* v. *Neal*, 15 Q. B. D. 471), and neither petitioner nor the dissenting judges below cite any American cases to the contrary. What was said in *Schwab* v. *Berggren*, 143 U. S. 442, 449, does not rise above the dignity of *obiter*, if indeed it is in point in this connection.

In those circumstances we think the court below was right in saying that to permit petitioner to appear in person would be to "substitute whim for necessity" (R. 46), and that it would also require the court "to invent for the occasion a species of the writ unknown to the 'usages and principles of law'" (R. 46).

Indeed, even if it could be assumed *arguendo* that a court possessed the power—the naked power—to order a prisoner before it for the argument of his own appeal, the mere existence of such power by no means would require that the order should have been made in the present case. It is clear that a petitioner who is represented by an attorney would not as a matter of law be entitled to be brought before the court. It is also clear that a person who is free from custody would, if he chose to appear without counsel, be free to argue his own cause before the circuit

court of appeals pursuant to the authority granted by Section 272 of the Judicial Code (*supra,* p. 3) to "plead and manage their own causes personally" and pursuant to the rules of the court which normally grant the right to oral argument. The question, therefore, is whether the statutory right to manage one's own cause goes so far as to require a circuit court of appeals to exercise its power to bring before it a prisoner who, because of his conviction, is not free to come and go as he pleases and therefore cannot independently come before the court.

We think the statutory right given to parties to "plead and manage their own causes personally" does not extend that far. The right to present oral argument before an appellate court is not an essential element of due process; important decisions are made by this and other courts without oral argument of any kind. Thus, motions to dismiss or affirm have traditionally been disposed of in this Court without argument. See *Carey* v. *Houston & Texas Cent. Ry.,* 150 U. S. 170, 179. The same is true of petitions for certiorari; oral arguments on such applications are a rarity. E. g., *In re Yamashita,* 327 U. S. 1. Nor is oral argument essential to enable an appellate court to decide questions which must be determined upon the record before it. See *Schwab* v. *Berggren,* 143 U. S. 442. The right granted by Section 272 of the Judicial Code is fulfilled by allowing an appellant, if he so desires,

to take his own appeal and prepare his own briefs. We think the court below was correct in holding that neither the statute nor rules of court were intended to insure a party "against external happenings which may circumscribe the right or interfere with its exercise" and that the inability to appear before a court is merely one of the deprivations that are "an inevitable and intended consequence of conviction for crime" (R. 46).

Any other conclusion would lead to absurd results. If the statute required a court to use its process to compel the production of every prisoner who chose to bring any form of legal proceeding in which oral argument is customarily allowed, prisoners could by the simple device of dispensing with an attorney compel the Government frequently to transport them across the continent. As the court below said (R. 48),

> Thus this spurious variant in the field of habeas corpus would outrank in urgency the great constitutional writ itself. One need not be a prophet to foresee the widespread abuse of the writ that would ensue, not to mention the items of fruitless burden and expense. To the legitimate hope of release by legal means would be added inducements not so legitimate; for temporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls.

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This very case presents an arresting example. Petitioner, confined in the Northern District of California, was convicted in the Eastern District of Michigan. If his contention under the present heading is sound, then, if he made a motion in the convicting court, he would be entitled as of right to be brought from Alcatraz to Michigan. In this very proceeding, if he chose not to accept the lawyer who was appointed for him by this Court, petitioner could insist that he be himself transported—at public expense, since the present proceeding is *in forma pauperis* (R. 67)—from Alcatraz to Washington, to argue his own case. It may well be, of course, that by his motion in this Court for the appointment of counsel (*supra*, p. 19), petitioner has abandoned his contention that his personal presence is "necessary" (Judicial Code, § 262) in this case.

We deem it proper to point out that, so far as the right of personal appearance is concerned, petitioner's brief here is hopelessly inconsistent with itself. On the one hand, it is argued that his successive habeas corpus proceedings, at two of which he was represented by counsel in the district court, must be treated with that deferential tenderness which, it is contended, the law accords the lay litigant. Petitioner's brief is full of references to "his inarticulate and legally imprecise manner" (Pet. Br. 15), to "an effort, however legally feeble" (Pet. Br. 16) to "petitioner's efforts, however imperfect" (Pet. Br.

17); and it is urged with some fervor (Pet. Br. 17) that "standards of technical pleading would hardly seem applicable when liberty and justice are the stakes." Then, on the other hand, it is argued that petitioner is entitled as of right to be taken to the appellate courtroom from his place of confinement—and if his principle is sound, it makes no difference what distance separates the two places, whether it be across the bay or across an entire continent—there to inflict upon the court these same "inarticulate and legally imprecise" contentions. It seems to us manifest that the right given by Section 272 to manage one's own cause does not require the courts to undertake such grotesque and essentially futile operations.

A prisoner who decides to dispense with an attorney obtains the advantages of an appeal by being allowed to take his appeal and file his own briefs. He is not substantially hampered in the prosecution of his cause by being unable to argue that cause personally. As the majority of the court below points out (R. 47), it is the practice, not only in that court, but in most circuit courts of appeal, to appoint counsel for an appellant acting without counsel in cases where oral argument is deemed of assistance in reaching a decision. Such a practice is, in practical effect, of infinitely greater assistance to an indigent appellant than would be the indiscriminate use

of a power to bring an incarcerated layman before it.

If the question whether a prisoner appealing in person should be brought before the court to argue his own appeal is a matter for the exercise of judicial discretion, as the Circuit Court of Appeals for the Fifth Circuit held in *Goldsmith* v. *Sanford,* 132 F. 2d 126, 127, certiorari denied, 318 U. S. 762, then here there was clearly no abuse of discretion in failing to order petitioner's production. The questions involved on his appeal, insofar as they involved matters of law, were not of the kind as to which a layman's arguments would be of significance; and petitioner had already demonstrated by his previous applications that he lacked the capacity to be of any particular helpfulness to an appellate court. Moreover, petitioner was confined in a penitentiary set aside for the incarceration of "habitual criminals and desperate and unregenerate long-term prisoners" (Rep. Atty. Gen., 1937, p. 150), and the court below was clearly justified in taking into consideration the potentialities of escape and the expense to the public of requiring production of prisoners under guard.

It would, we submit, be difficult to imagine any situation in which the presence of a lay prisoner to argue his appeal in person could be deemed so necessary for the doing of distributive justice as to warrant his production in court under

guard. And, quite obviously, no such situation was presented here.

CONCLUSION

The decision under review is correct. It reflects a reaffirmation of sound principles of law, and accords with wise policies of judicial administration. The judgment of the court below should therefore be affirmed.

Respectfully submitted.

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DECEMBER 1947.

APPENDIX

In the District Court of the United States for the District of Kansas, First Division

No. 988 H. C.

EDWARD CASEBEER, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT

Order discharging writ of habeas corpus

Edward Casebeer, hereinafter called the petitioner, was convicted in the United States District Court for the District of Kansas under an indictment filed September 28, 1935, in criminal case No. 6209. The indictment charged a robbery of the First National Bank of Smith Center, Kansas, committed on February 1, 1935. It alleged that the petitioner and two co-defendants (not apprehended or tried) robbed the bank with force and violence, in which kidnapping of certain officials was incident to the crime. Petitioner denied his guilt and was subsequently placed on trial before the Honorable Richard J. Hopkins, District Judge. In a jury trial, at which he was represented by employed counsel, a verdict of guilty was returned on December 7, 1935. Timely motions for a new trial and for arrest of judgment were filed by the petitioner, the hearing of which was continued by the court at his request until

April 13, 1936, at which time the Court overruled the motions and entered judgment. Petitioner was sentenced to twenty years' imprisonment in the Leavenworth penitentiary and promptly filed his notice of appeal. On January 16, 1937, the United States Circuit Court of Appeals; Tenth Circuit, affirmed, the opinion being reported at 87 F. 2d 668.

After entering on service of his sentence, petitioner challenged validity of the conviction by a writ of habeas corpus in this court, same being No. 538 H. C. Said action was heard by the Honorable Orie L. Phillips, Circuit Judge, assigned as a special judge to hear the cause. Petitioner was permitted to proceed in forma pauperis and a full hearing was had, following which the writ was discharged and the petitioner remanded to custody. An appeal was taken to the Circuit Court, and on review, in an opinion reported at 114 F. 2d 789, the ruling of Judge Phillips was affirmed.

Petitioner then applied for a writ of certiorari to the Supreme Court, which court, without opinion, reversed the judgment of the Circuit Court and remanded the cause with directions to consider the appeal in the light of a transcript of the testimony taken at the hearing before Judge Phillips on the petition for the writ (*Casebeer* v. *Hudspeth, Warden,* 312 U. S. 662).

The appellate court, following mandate of the Supreme Court, then considered petitioner's appeal in the light of the transcript. It obtained the record of the habeas corpus hearing on which the cause had been submitted. In addition, the petitioner requested a transcript of the hearings

on a supplemental motion for a new trial in the criminal case. That transcript was also prepared and filed with the appellate court, which was considered, as directed by the Supreme Court, in the light of the transcript of the testimony adduced at the habeas corpus hearing. The Circuit Court again affirmed (121 F. 2d 914). Petitioner again applied for certiorari to the Supreme Court, but the same was denied (*Casebeer* v. *Hudspeth, Warden,* 316 U. S. 681).

In November 1941, petitioner filed a motion in his criminal case to correct the record, which motion was considered by Judge Phillips on December 31, 1941, and denied.

In June 1942, petitioner filed a motion to vacate the judgment and sentence in his criminal case, No. 6209, requesting a hearing, and the production witnesses and records. This motion was heard by Trial Judge Hopkins and denied on July 9, 1942. Petitioner then filed a motion to set aside Judge Hopkins' order of July 9 and requested that another judge be appointed to hear the cause. Upon the filing of this motion, the Honorable Bower Broaddus, United States District Judge for the Eastern, Northern, and Western Districts of Oklahoma, was assigned to hear the matter. On a hearing at Topeka, Kansas, September 25, 1942, the petitioner being represented by counsel also appeared personally and testified. The cause was taken under advisement. Briefs were filed and findings of fact and conclusions of law were made. On February 13, 1943, Judge Broaddus likewise overruled petitioner's motion to correct the record.

On March 29, 1943, petitioner presented an application for leave to file a writ of mandamus or an equivalent order and prosecute the same in forma pauperis, accompanied by an affidavit to disqualify Judge Hopkins. Said application was thereupon considered by the Honorable Royce H. Savage, United States District Judge for the Northern District of Oklahoma, and on March 29, 1943, denied.

Thereupon, petitioner filed a second application for writ of habeas corpus, No. 826 H. C. Said cause was heard by the Honorable Walter A. Huxman, Circuit Judge, assigned to hear said action. Following a hearing, in an opinion filed June 18, 1943, the writ was discharged and petitioner again remanded to custody.

On September 4, 1943, a third habeas corpus petition, No. 852, was filed. A writ was issued, counsel appointed for petitioner, and on October 13, 1943, said cause was dismissed by Judge Huxman for lack of merit.

On April 20, 1944, petitioner's fourth habeas corpus petition, No. 878, was lodged with the court. Thereafter, at Leavenworth, Kansas, and on October 16, 1944, petitioner again appeared before Judge Huxman pursuant to writ of habaes corpus, and said cause was dismissed by the court. The Court, in entering a dismissal, introduced for the benefit of petitioner, as a part of the record in said cause No. 878, the entire record in No. 826 H. C. and 852 H. C. and authorized petitioner to appeal to the Circuit Court in forma pauperis. From the above orders and rulings of Judge Huxman, no appeal was taken.

On September 13, 1946, petitioner instituted a mandamus action, No. 6016, accompanied by an affidavit of bias and prejudice against Judge Huxman, requesting the Court to issue orders to the present clerk and a former clerk of the Court to show cause why they had not performed their official duties. Petitioner charged that certain documents in his criminal case had been falsified; that a transcript of testimony of a Federal Bureau of Investigation Agent was deleted in part; that in connection with his motion for new trial he had filed more than twenty affidavits, whereas the record shows but three; that several important affidavits of the petitioner were missing, and two had been added by the office of the United States Attorney, and none of those submitted by the petitioner had filing dates. Petitioner further charged that a former United States Attorney was permitted, by a former clerk of this court, to remove from the files a certain affidavit made by a witness for the petitioner and to substitute one of his own in its place. Various other direct and indirect charges, including conspiracy on the part of Government officials, the furnishing of false transcripts of testimony to defraud petitioner of proof of what had occurred in his trial, and suppression of evidence to prove his former habeas corpus cases were alleged by petitioner. An alternative writ of mandamus was issued and the cause set for hearing by order of the Court before the Honorable J. Foster Symes, United States District Judge for the District of Colorado.

On a full hearing October 1, 1946, Judge Symes, finding petitioner's claims and contentions to be

without substance, discharged the alternative writ of mandamus and dismissed the action.

The instant habeas corpus proceeding, No. 988 H. C., was filed on October 9, 1946. It was alleged that petitioner's conviction had been brought about as a direct result of fraud, perjury and conspiracy; that a conspiracy existed between Wint Smith, former head of the Kansas Highway Patrol, S. S. Alexander, former United States Attorney, and Lawrence J. Richardson, former official court reporter. Petitioner charged under oath that as a result of said conspiracy public officials had committed the crime of perjury in his criminal case. An indirect charge was made that the Federal Bureau of Investigation knew of the perjury; that fraud after fraud had been perpetrated upon the trial court, the upper courts, the office of the pardon attorney and the Attorney General of the United States to prevent petitioner having a fair or impartial hearing before the courts or before the pardon attorney. In various motions and supplements to petitioner's application, he reiterated that his conviction was void because of conspiracy between public officials and the knowing use of perjured evidence by prosecuting authorities.

It was contended that as an incident to his conviction, allegedly gained by fraud, conspiracy and perjury of the former head of the Kansas State Highway Patrol, that a former clerk of this court had one of petitioner's attorneys prepare and sign a phony letter and place it in petitioner's criminal case to cover up certain missing affidavits of which both had knowledge; that the former head of the Kansas State Highway Patrol,

through influence of a so-called political machine, completely dominated all the officers of the United States court for the District of Kansas at the time of petitioner's trial. It was alleged that respondent's attorney had knowledge that petitioner's conviction was the result of conspiracy, fraud and perjured testimony, knowingly used by prosecuting authorities.

At the request of petitioner, the Court, at government expense, caused process to be issued for the production of many witnesses whose evidence, it was contended by the petitioner, would prove the charges made in this action. Repeated hearings were accorded petitioner and full opportunity was afforded him to produce, through depositions as well as personal attendance of witnesses, any evidence to sustain his charges of irregularities in the criminal case.

The petitioner was brought before the court on successive writs of habeas corpus on November 17 and December 23, 1946; on January 31, March 7, May 9, June 4, and July 2 and 3, 1947. Witnesses at petitioner's various hearings who were interrogated and testified at his behest included the following:

S. S. Alexander, former United States Attorney for Kansas.

Wint Smith, former head of the Kansas State Highway Patrol.

Lawrence J. Richardson, former Federal Court Reporter.

D. C. Hill, former Assistant United States Attorney.

T. V. Melvin, Special Agent, Federal Bureau of Investigation.

A. S. Reeser, Special Agent, Federal Bureau of Investigation.

Frank Flack, former United States Commissioner.

Clyde Schenck, petitioner's counsel at Commissioner's hearing.

Edward M. Boddington, original court appointed counsel.

Joseph H. Brady, petitioner's counsel in criminal case.

Nona E. Snyder, associate counsel for petitioner in criminal case.

Michael D. Konomos, attorney employed by petitioner concerning motion for new trial.

Edna Wing, Secretary to attorney Michael D. Konomos.

Ernest Verhuel, inmate Federal Penitentiary.

Carl. F. Zarter, Record Clerk, Federal Penitentiary.

Harry M. Washington, Clerk, United States District Court.

Howard F. McCue, former Clerk, United States District Court.

A. D. Weiskirch, petitioner's attorney on appeal of criminal case.

Robert Lindsay, former Federal Probation Officer.

Dean F. Rogers, former Sheriff, Shawnee County, Kansas.

Randolph Carpenter, United States Attorney for Kansas.

After conclusion of the hearing of July 3, 1947, petitioner offered in evidence depositions taken in this cause in Milwaukee, Wisconsin, on January 27 and May 21, 1947, and having announced that he had no further evidence to offer, said cause was submitted to the court and taken under advisement.

The Court, on consideration of the files and

records in petitioner's criminal and former habeas corpus actions, and the evidence adduced in this cause, finds all the issues in favor of the respondent and against the petitioner. The Court finds:

Findings of fact

That petitioner has not sustained the burden of proof required of him to establish that a conspiracy existed among public officials to convict him or that perjured evidence was knowingly used or improper practices engaged in by such officials in petitioner's criminal case. On the contrary, the Court finds that petitioner's suppositions in this regard are nothing more than fantasy of a crass variety and entirely without support of credible evidence.

In the light of the record as a whole, after what it believes has been a meticulous examination of the redundant, if not frivolous proposals offered by petitioner, this Court is constrained to now hold that the petitioner's conviction is clothed with unassailable validity.

Conclusions of law

A judgment and sentence in a criminal case bears the presumption of validity.[1]

The United States District Court for the District of Kansas had jurisdiction of the offense with which petitioner was charged, tried and convicted and over the person of the petitioner.[2]

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[1] *Johnson* v. *Zerbst*, 304 U. S. 458; *Macomber* v. *Hudspeth*, 115 F. 2d 114.

[2] *Casebeer* v. *United States*, 87 F. 2d 668.

In a habeas corpus proceeding, the Court is concerned only whether the petitioner was convicted in a court having jurisdiction of the offense and of the petitioner, and whether the sentence imposed was authorized by statute.[3]

That the sentence imposed against the petitioner was within the discretion of the trial court; that the same was authorized by statute, and was not excessive or unusual punishment.[4]

Sufficiency of proof to sustain a charge upon which a conviction has been obtained cannot be tested on habeas corpus.[5]

A writ of habeas corpus may not be used as a substitute for an appeal.[6]

To justify habeas corpus on the ground that a petitioner was denied constitutional right to a fair trial, an extreme case must be disclosed and it must be shown that the proceedings resulting in his conviction were a farce and mockery of justice.[7]

A collateral attack on a judgment may be sustained only when objections to it are such as to render it not merely erroneous, but void. Perjury does not ordinarily render a judgment void. A judgment cannot be set aside in a collateral proceeding on the ground of perjury unless false testimony is so entwined with other circumstances as to deprive the proceeding of its character as due process of law.[8]

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[3] *Moore* v. *Aderhold*, 108 F. 2d 729.
[4] *Schultz* v. *Zerbst*, 73 F. 2d 668.
[5] *Casebeer* v. *Hudspeth*, 121 F. 2d 914.
[6] *Glascow* v. *Moyer*, 225 U. S. 420.
[7] *Diggs* v. *Welch*, 148 F. 2d 667.
[8] *Hodge* v. *Huff*, 140 F. 2d 686.

In Federal Courts a discharge through habeas corpus of a prisoner confined under a judgment of conviction is granted only in the exercise of a sound judicial discretion. The remedy is an extraordinary one, out of the usual course, and involves a collateral attack on the judgment constituting the basis of the detention. The instances in which the writ is granted are exceptional and must of necessity be confined to situations where there is a peculiar and pressing need for it or where the judgment under which a prisoner is retrained is wholly void.[1]

In the judgment of this Court, the proof offered by the petitioner falls far short of measuring up to the tests required for vitiating the solemn judgment of a court of competent jurisdiction.

It is, therefore, by the court, considered, ordered, adjudged and decreed that Edward Casebeer, the petitioner in this cause, is in the lawful, legal custody and control of the Warden of the United States Penitentiary at Leavenworth, Kansas, and he is therefore remanded to the continued custody and control of the Warden until service of the sentence heretofore imposed in Criminal case No. 6209 of this Court is completed or until the petitioner is discharged as by law provided.

[S] Arthur J. Mellott,
ARTHUR J. MELLOTT, *Judge.*

Dated at Kansas City, Kansas, this 24 day of July 1947.

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[1] *Goto* v. *Lane*, 265 U. S. 393.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1947

No. 111

HOMER C. PRICE;
Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMICUS CURIAE.

WAYNE M. COLLINS,
Mills Building, San Francisco 4, California,
Attorney for Amicus Curiae.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 111

HOMER C. PRICE,
Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California;
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMICUS CURIAE.

QUESTIONS INVOLVED.

1. May a Court set up as a bar absolute to an award of a writ of *habeas corpus ad subjiciendum* the petitioner's inability to have urged in a previously denied application for the writ grounds for the award thereof which then were unknown and unknowable to him?

2. Is a Circuit Court of Appeals without power to award an ancillary writ of habeas corpus in aid of its appellate jurisdiction?

STATEMENT OF FACTS.

The petitioner is a prisoner serving sentence in the United States penitentiary at Alcatraz Island in San Francisco Bay under a conviction for crime. While so serving he presented successively to the District Court four petitions for a writ of habeas corpus seeking a release from imprisonment. Each petition was denied and appeals taken from three were affirmed. Although each raised identical questions, the fourth, by way of amendment to the petition and as amplified in the supporting brief on appeal which the Circuit Court treated as incorporated in the petition, asserted a new ground for release. It alleged his conviction was the product of a type of extrinsic fraud practiced upon him and the Court by the prosecuting attorney.

The Circuit Court on appeal affirmed the denial of the fourth petition, Denman, C. J., and Stephen, C. J., dissenting. The affirmance appears to have been made on the Circuit Court's assumption that the petitioner "hardly could have been unaware" of the facts of the alleged fraud and of its "implications" and that from his showing (pleadings) it was "apparent" he knew about the alleged misconduct at the time of its occurrence and had failed to set

forth in his fourth petition "reason or excuse" for his failure to set up the same ground in a prior petition for the writ.

His said appeal has been consolidated with his appeal from an order of the Circuit Court denying him an ancillary writ of habeas corpus commanding the warden to produce him in that Court for the purpose of enabling him to argue the merits of his appeal in person as his own counsel. That Court sitting in bank denied his motion for the ancillary writ, Denman, C. J., and Orr, C. J., filing a joint dissenting opinion.

ORIGIN, TYPES AND PURPOSES OF WRITS OF HABEAS CORPUS.

Personal liberty is a "natural" right and as such is recognized, guaranteed and protected by each civilized government worthy of the name. Neither the English Habeas Corpus Act of 1679 (31 Car. II, c. 2) nor our own creates a right to personal freedom from unlawful governmental or private restraint but each sets up the procedural machinery for the enforcement of the right.

The origin of writs to relieve from illegal detention may be traced back to an ancient English tribal practice which we have inherited as a part of the common law of England. The recognition by the people of the necessity for writs to guarantee personal liberty and their ultimate creation were expressions of a common desire for freedom from governmental and

private sequestration. The special writs *de odio et atiâ* and *de manucaptione* were in use in the 12th century and were followed by the creation of a number of special writs designed to secure the liberation of persons suffering an illegal restraint of their liberty. These writs generically are designated writs of habeas corpus and, depending upon the specific purpose for which they were to be used, variously were termed writs of *habeas corpus ad deliberandum et recipiendum, ad faciendum et recipiendum or cum causa, ad prosequendum, ad respondendum, ad satisfaciendum, ad subjiciendum* and *ad testificandum*. The appropriate remedy for detention imposed by private persons prior to *Trebilcock's* case in 1736, was known as the writ *de homine replegiando* but since then the writ *habeas corpus ad subjiciendum* has been recognized as the remedial mandatory writ of right to obtain a release from an illegal restraint whether imposed by governmental agents or private persons.

The procedure known as "manifestation" which was followed in medieval Aragon resembled the writ of habeas corpus. See Hallam, "Middle Ages", Vol. ii, c. iv. Various writs resembling habeas corpus have been adopted as part of the judicial process in countries where Roman-Dutch law prevails. See 12 Encyclo. Brittanica, 11th ed. p. 786. It is to England, however, that we are indebted for the writs of habeas corpus. They originated and could have originated only with a zealous people willing to take extraordinary measures to preserve and insure their freedom.

The extraordinary writ of *habeas corpus ad subjiciendum* is a remedial mandatory writ of right we have derived from the common law. It is safeguarded in its entirety by Section 9 of Article I of the Constitution which sets up a prohibition against the suspension of the privilege of the writ except when in cases of rebellion or invasion the public safety may require it. The prohibition possesses as much constitutional dignity as does the vestiture of judicial power in the Courts. Inasmuch as the privilege of the writ is a fundamental right lodged in the people the exercise of the right is one which may be *expanded* but not be diminished by executive, legislative or judicial action. Any restriction placed by the judiciary on its operation would impair its efficacy and violate the constitutional safeguard. In consequence, we believe any impairment of the proceeding in this country indicates a trend of our own government toward decadence and the inevitable totalitarianism which is to follow.

The remedy provided by this writ which was termed by Blackstone to be "the most celebrated writ in the English law" was unknown to Hitler's Germany and is unknown to Stalin's Soviet Union. As a result the world recently was astounded to learn of the revolting happenings at Auschwitz and is shocked at what still goes on in the concentration camps concealed in the Siberian wilderness. Our own concentration camps, however, conceived in prejudice and malice but conducted with less brutality, did not appear to shock the conscience of our executive serv-

ants for they confined our Japanese population therein for several years and the program has not yet ended.

Aside from the revolutionary power resident in the people to change the organic law of the nation the right to the writ as transmitted to us from the common law and as since enlarged constitutes the only and final protection we possess against the pernicious use of *lettres de cachet* and other forms of illegal imprisonment. Detention under a void or invalid judgment, although possessing the appearance of legality, is but a judical form of such *lettres.* If the remedy in anywise may be impaired tyranny may rise unchallenged to undermine and threaten the existence of republican democracy.

The writ is supposed to be awarded by the judiciary in the exercise of what, in spirit and in substance, is the liberating power lodged in the judicial branch of government to discharge from illegal imprisonment. Its counterparts in the other divisions of government are the *pardoning-power* in the executive branch and the *law-amending-power* in the legislative branch whereby like results can be obtained. It is, in this respect, one of the original four *veto-power-methods* whereby wrongful detention might be averted or terminated. A similar power once was lodged in the people by the creation of the jury system which vested in grand juries the power to veto unpopular and unjust law by refusing to return a true bill and in petit and pix juries to relieve accused persons from imprisonment simply by returning a not guilty verdict. These historic purposes of juries long ago were

thwarted when legislators and Courts commenced to place restrictions upon the authority of juries and thereby embarked upon a gradual program of shearing the people in order to concentrate a greater measure of arbitrary authority in the hands of governmental agents. This was accomplished somewhat painlessly because of public ignorance and apathy towards governmental invasion of private right and, under the circumstances, the people did not realize they had been fleeced of a most important right. The trend continues. The remedy of habeas corpus is being reduced to an ineffectual remedy by judicial tampering. The trend is alarming. Groping about with a searchlight today Diogenes would be hard put to discover any vagrant power overlooked by the government that yet might be reserved to the people.

It is difficult enough for an accused person to obtain what may be designated a completely fair and impartial trial. He is indicted by a grand jury which is an agency of a government. He is prosecuted by a government prosecuting attorney in a government Court presided over by a judge acting as the judicial servant of that government. He is tried by a jury selected by and representing that government. The situation in which he finds himself has the appearance of a trap and the odds are against him from the start. The original purpose of a jury was to allow jurymen, as peers of the accused, to act as representatives of the people and to pit themselves against the government to insure to the accused, as a member of the society to which they belonged, a fair trial.

The historic purpose of the jury system has been diverted for the jury today is an agency of the government and has been shorn of its original powers. These things are arguments in themselves that the remedy afforded by the writ should be zealously guarded by the judiciary.

Under the common law and under statute the application for the writ may be made in succession to justices, judges and Courts. See 28 USCA, secs. 451 and 452. The reason for this was that one in the line of succession might grant a deserved relief after others had refused it. Tom Mooney, long regarded in some circles as a martyr to the cause of labor, might not have suffered such a long period of imprisonment had applications for the writ been presented to judges successively and one have been found impressed by the injustice done him and possessed of enough intellectual courage to award the writ and terminate his detention. The lives of Nicola Sacco, the shoemaker, and Bartolomeo Vanzetti, the fish-peddler, as well as of others, also might have been preserved by a like procedure. Although the lodging of power in various Courts and judges to award the writ was designed to enable them to exercise a veto power over unjust imprisonment they appear to grow more reluctant to exercise the power with the passage of the years and thereby to nullify the remedy itself. We do not believe, however, that the most important writ ever devised by the brain of man should be stripped of its efficacy simply to serve whimsy upon a mere plea that the stripping might contribute to judical convenience.

The habeas corpus remedy was designed as a check upon unrestrained governmental power whether the power was exercised by legislative, executive or judicial officers. The power to award the writ was conferred upon various Courts, judges and justices for the additional reason that had it been lodged only in one tribunal that tribunal probably would have been reluctant to award the writ to a person wrongfully incarcerated by its own process. In consequence, the power wisely was lodged in judicial tribunals, justices and judges so that they, in succession, might exercise a veto-power over unlawful imprisonment caused by a judicial tribunal.

SUCCESSIVE APPLICATIONS FOR THE WRIT ARE AUTHORIZED.

It is this check upon unrestrained judicial power which the majority opinion of the Ninth Circuit Court casts to the winds simply, as it asserts, to serve a mere rule of convenience it has legislated into existence. In creating the rule, admittedly framed to lighten a claimed work-burden of the district and Circuit Courts below, the Ninth Circuit Court was guilty of usurping a legislative power lodged exclusively in Congress by Section 1 of Article I of the Constitution and of wielding an extra-constitutional power in violation of Section 9 of Article I of the Constitution because its rule would suspend the privilege of the writ.

The right to file successive applications for the writ based upon the same grounds is a right long recognized at common law and under our own statutes. It is only by successive applications that a petitioner's rights may receive that final protection from unlawfulness that it is the goal of our legal system to attain. Poverty stricken defendants are unable to afford and to prosecute an appeal to finality and, in consequence, the writ is their only and last chance for liberation from illegal imprisonment. Where incarceration is the result of extrinsic fraud or is had pursuant to a law assumed at the time of conviction to be valid but subsequently declared to be unconstitutional there would be no method of gaining freedom except through the medium of the writ. An appellate review of a denial of the writ frequently is caused by a misconception or misapplication of the law by an appellate tribunal and results in a miscarriage of justice. The allowance of a writ of certiorari to review the decision of a Circuit Court frequently is refused on grounds dictated by necessity or policy instead of on the merits. In such instances all avenues to the final liberation of a prisoner wrongfully imprisoned have been closed save the one by successive applications for the writ. To close this path would penalize the pauper who could afford neither an appeal nor counsel to conduct an appeal. It would also be admission from our judicial officers that our judicial system countenances obvious miscarriages of justice. It would be tantamount to a judicial declaration that our Courts, in the interest of judicial con-

venience, would refuse to exercise their veto-power over unjust imprisonment and would rest content to let illegally confined persons rot in jail. We cannot believe our judicial system to be so imperfect.

In *Loisel v. Salinger*, 265 U. S. 224, 230, this Court declared that a prior refusal to discharge on one application for the writ was not "without bearing or weight" on a subsequent application and even might be given "controlling weight" thereon. This was, in substance and effect, a recognition that a refusal to grant a prior application might possess evidentiary weight on a subsequent application but was not a bar thereto and, in consequence, was a holding that the doctrine of *res judicata* did not apply in habeas corpus proceedings. In *Swihart v. Johnston*, 150 Fed. (2d) 721, the Ninth Circuit Court applied the rule established in the *Loisel* case but ventured a dictum that a petitioner should not be permitted to reserve known issues to be raised in a subsequent petition. However, in *Waley v. Johnston*, 316 U. S. 101, this Court expressly recognized the right of a petitioner to reserve questions to be raised in a subsequent petition. See also *Hawk v. Olson*, 326 U. S. 271, where this Court viewed the doctrine of *res judicata* as being inapplicable to successive applications for the writ even though the applications were based upon identical grounds. See also *Kerr v. Squier*, 151 Fed. (2d) 309, 310, where a panel of the Ninth Circuit itself rejected the doctrine of *res judicata* in such cases and also repudiated the dictum against reserving points another panel previously had set forth in the *Swihart* case.

In the case below, the same Court, sitting in bank, shifted to a different view and seemingly repudiated the repudiation. Venturing further, it refused to consider the new ground the petitioner set forth in his petition for the writ and arbitrarily deprived him of the chance even to explain why the point had not been raised or urged in his prior applications. In so doing it has created chaos in the line of decision in its own judicial district and decided the case in diametrical conflict with the above-mentioned applicable decisions of this Court. It is obvious that there is no stability in the line of decision on the point insofar as the Court below is concerned. The rule it invokes one day is disregarded the next and applied the following. See *Johnston v. Wright,* 137 Fed. (2d) 914, where it finally granted a petitioner's fourth petition for the writ although it was based upon identical grounds as three previous ones which had been denied. Through the instrumentality of the writ a deserved release was ordered. That case illustrates that it is the writ which lends to the law a semblance of perfection in the preservation of human liberty however delayed it may be in operation.

THE CIRCUIT COURT USURPED LEGISLATIVE POWER IN LEGISLATING INTO EXISTENCE A RULE OF PLEADING AND OF EVIDENCE.

The majority opinion of the Circuit Court below seeks to justify an affirmance of the District Court's decision by legislating into *esse* a new rule of pleading and also a novel rule of evidence in violation of

Sec. 1 of Art. 1 of the Constitution. It requires a petitioner to satisfy the Court that he has a valid excuse for not having urged his newly asserted grounds in his prior applications for the writ. This judicially legislated requirement has neither the sanction of Congress nor the weight of tradition behind it. It compels a petitioner, even a layman proceeding *in propria persona,* to plead anticipatory defenses in his petition in order to preclude an unpleaded defense of *res judicata* or plea in the nature thereof in a return thereto although no such legal requirement is anywhere to be found, named or defined. In addition thereto, it places a burden of proof upon such petitioner to negate that unpleaded defense. Whether this spurious burden requires proof by clear and convincing evidence, or to a moral certainty or by a preponderance of the evidence is unknown.

The requirement so legislated into existence seems to demand satisfaction even though the newly asserted grounds for the writ could not have been known to the petitioner when he filed his prior applications for the writ. The facts asserted in his latest petition, as amplified in his brief in support thereof, alleged a type of extrinsic fraud was practiced upon him and the trial Court by the United States attorney during the course of the trial proceedings out of which his conviction of crime arose and his imprisonment ensued. It was this allegation that brought the case within the due process rule announced in *Mooney v. Holohan,* 294 U. S. 103, 112. It is apparent that the

petitioner could not have been aware of the existence of those grounds until sometime after his conviction and it must be inferred that he was unaware of those facts when his prior applications for the writ were determined against him. No opportunity was given or offered to him to satisfy the doctrine first announced by the Circuit Court below. The requirement, as created and applied by that Court is a retroactive, Court created and novel rule of pleading and of evidence the latent existence of which no one could have been aware or foreseen until the majority opinion of the Court was filed in the proceeding below.

The Circuit Court apparently imputed to the petitioner knowledge of the rule of pleading and of evidence it thereafter was to create and invoke against him and thereby penalized him for his lack of forensic foresight. The establishment of rules of pleading and of evidence lie outside the province of Courts. The imputation to a petitioner of knowledge of rules to be created *in futuro* constitutes an exercise of arbitrary legislative power lying wholly outside a Court's jurisdiction. We had supposed the law to have a little certainty and stability so that a person, layman or professional, might be apprised of rights and remedies in advance of their assertion.

If the Courts below are apprehensive about the rate at which petitions for the writ are filed in their judicial district by inmates of Alcatraz, it must be remembered that over a ten year period only 368 petitions were filed in the District Court below. This would not seem to establish a worrisome burden. It

means that each of the four district judges has been required to pass upon an average of nine such petitions per year. The great majority of such petitions are denied without further ado because they fail to state grounds for the issuance of the writ on their face. If the few that required summary hearings presented a serious time absorbing problem the remedy lies in increasing the number of district judges and not in an arbitrary decrease in the number of causes by resort to deprivations of lawful rights in the interest of judicial convenience. The figures lead us to believe the disturbance caused by Alcatraz prisoners' applications for the writ is little more than a tempest in a teapot.

There is a genuine but inarticulate cause of concern over the heavy work-burden carried on the shoulder of the district judges in the Southern Division of the Northern District of California. They handle what is undoubtedly a larger volume of cases than in any other federal judicial district and do it uncomplainingly. They are taxed to the limit of human endurance. Their labors are onerous and trying but they do not complain. No fault is to be found with them. The fault lies in the system that compels four district judges to do the work which ordinarily would require the full time of eight. Although the population the District Court serves has increased enormously in the past few years it has been recommended that Congress authorize the appointment of but one additional district judge for the district when four additional judges are needed.

CIRCUIT COURTS ARE EMPOWERED TO ISSUE ANCILLARY WRITS OF HABEAS CORPUS IN AID OF THEIR APPELLATE JURISDICTION.

It is particularly significant that the majority opinion of the Circuit Court below does not state that it had power to command the issuance of an ancillary writ of habeas corpus to compel the production of the petitioner before that tribunal to argue his case in person and to question him on his appeal and that, in the exercise of its discretionary power, it refused to issue the writ for such purposes. It states something quite different. That Court declared it had no power lodged in it to have the writ issue in aid of its appellate jurisdiction. With such a conclusion we cannot agree. If that Court is denied such a power then our Appellate Courts are powerless altogether in habeas corpus proceedings and their function is limited to a mere reviewing of decisions and a rendering of opinions which are mere suggestions possessing more or less persuasive weight but utterly lacking in force. We conclude that the majority opinion of the Court below seeks to strip itself of a power of which even Congress could not strip it constitutionally. The authority to issue such ancillary writs is inherent in the grant of judicial power, is a necessary incident thereof and is implied. In addition, the statute, 28 USCA, Sec. 377, specifically confers upon Circuit Courts "power to issue all writs * * * which may be necessary for the exercise of their respective jurisdictions". This necessarily includes the power to provide for the issuance of ancillary writs of habeas corpus.

The number of cases where a person acts as his own counsel are few. Pauper prisoners are aware of the adage that one who acts as his own counsel generally has a fool for a client. They are driven to act as their own counsel simply because of their poverty and the failure of Courts to offer the services of counsel to them. If the Circuit Court below did not wish to authorize the appearance of the petitioner or to summon him to argue his own case it could have appointed counsel to represent him. Instead it denied him the right to appear, to defend and to argue his cause and allowed the respondent to conduct an argument against him during his enforced absence. This was an outright denial to him of his day in Court and we contend that it was an abuse of judicial discretion.

A Court is not authorized to compel a prisoner to employ counsel or to accept the services of appointed counsel to represent him against his desire. He is entitled to be represented by counsel if he so wishes. He also is entitled to represent himself. This is provided for by 28 USCA, Sec. 394, which guarantees the traditional right to litigants to "manage their own causes personally". The statute, therefore, safeguards his right to appear and argue his own cause in person whether it be before a trial or an appellate tribunal. He also is entitled on appeal "to open and conclude the argument of the case". See Rule 22(1) of the Rules of the U. S. Circuit Court of Appeals for the Ninth Circuit. If he elects to act as his own counsel he ought to be accorded the

privileges and courtesies accorded counsel. A refusal of a Court to permit him to argue his case would be contrary to "the settled course of judicial proceedings" and also contrary to "established modes of procedure" and, therefore, would appear to be a deprivation of the procedural due process of law guaranteed by the Fifth Amendment. See *Frank v. Mangum*, 237 U. S. 309, 326.

The Sixth Amendment guarantees the right to counsel in criminal cases and we submit that in quasi-criminal proceedings such as habeas corpus which spring from criminal convictions, the Fifth Amendment confers that right as an element of due process and of the equal protection of the laws implicit in that guaranty. Were it otherwise, convicts would be deprived of an essential right simply by reason of their poverty and the due process clause would be meaningless for the poor and the unfortunate.

Once it was the fashion to consider appellate review to be a mere matter of "grace". The fact, however, is that an appeal is an absolute matter of "right" just as much as is the right to trial in inferior Courts. The figment of "grace" obtruded into prominence in juristic circles when a civil servant in the robes of a chancellor operating in the domain of law in the interest of the church was anxious to convince an ignorant populace that ecclesiastics had won something for them which they already possessed. An appeal from a judgment of an inferior Court in a criminal case is a statutory right and remains a right until the cause is finalized by the exhaustion

of all the remedies directly and collaterally available. Appellate review cannot be made the exclusive privilege of the well-to-do. It is not a subject of "grace" to be allowed or withheld at the caprice of any tribunal. It is a right safeguarded by the due process clause.

It long has been recognized that writs of habeas corpus might be used as ancillary to writs of error and writs of certiorari. See article on "Habeas Corpus" by William Feilden Craies, 12 Encyclo. Brit., 11th Ed., p. 785. An appeal from a denial of the writ presents to an Appellate Court a simple matter of review of the legality of detention. In consequence, where the presence of the petitioner for argumentation or for inquisitional purposes is necessitated, an ancillary writ of habeas corpus to compel the production of the prisoner in aid of a Court's appellate jurisdiction would not only appear to be authorized and desirable but necessary as well. The power to award such a writ is part of our common law and is confirmed in our Federal Courts by 28 USCA, Sec. 377. The power of Circuit Courts of Appeals to issue ancillary writs of habeas corpus in appeal cases of which they have jurisdiction is one of the necessary procedural instruments "for achieving the rational ends of law." See *Adams v. U. S.*, 317 U. S. 269, 273.

An appeal to a Circuit Court from a final order denying a petition for the writ is a civil proceeding. It was a common law practice for an appellate tribunal, either in its original jurisdiction or in aid

of its appellate jurisdiction, to issue a special writ to remove the cause and also the body of a defendant from an inferior Court to the Appellate Court. The writ so issuing in such a case was known as the writ of *habeas corpus ad faciendum et recipiendum* and also as the writ of *habeas corpus cum causa.* See *Ex parte Bollman,* 4 Cranch 93, 2 L. Ed. 554, 562. Similarly, the writ of *habeas corpus ad testificandum* issues to compel the production of a prisoner to testify in a cause. It is a variant of a summons. It would seem that either form of the writ might be used to produce a prisoner before an Appellate Court to testify or to argue in his own cause. The modern form of the generic writ of habeas corpus no longer is confined to the precise written forms that existed at common law and, as a matter of fact, it now is customary to refer to each and all of the types simply as writs of habeas corpus. The primary function of each type is to produce the body of a person before a Court for whatever purposes may be essential to the proper disposition of a cause. The majority opinion of the Circuit Court below admits that it has made a practice of awarding the ancillary writ of habeas corpus for the purpose it here has condemned but announces that it is abandoning the practice in the interest of judicial convenience.

We attach little importance to the prophecy contained in the majority opinion of the Circuit Court below that the production of petitioners to argue their causes might be made simply as an inducement "for temporary relief from prison confinement"

and the prospects for escape on the "excursion beyond prison walls". Prisoners leave Alcatraz Island in chains and in the custody of armed guards and are brought by boat to San Francisco where they are transferred to the marshal's van. Soon thereafter they are confined behind bars in his jail in the Post Office Building until they are conducted into the courtroom where they remain manacled and in chains and in the immediate custody of armed guards during the hearing. Sightseeing is conspicuous by its absence. The trip is devoid of allure for the prisoner, if observed at all by private persons, is seen in his fettered condition which causes as much embarrassment to him as the hopelessness of his prospects for success at his hearing.

CONCLUSION.

If our Courts may impair the people's right to the great constitutional writ, the Courts themselves will be responsible for paving the road for the destruction of the most fundamental safeguard to liberty we possess. Today it is an Alcatraz prisoner's rights with which we are concerned. Tomorrow it may be the rights of a person against whom no accusation has been filed. The course upon which we are bent by such steps is that leading to dictatorship. The great writ of human liberty is one of the chief characteristics that distinguishes not only our legal system but our Republican form of enlightened government from regimented states where individual liberty is

nonexistent. We submit that the writ should not be sacrificed to the evanescent passion of the moment simply that the ends of judicial convenience be served. We urge that the decision of the Circuit Court below be reversed and that it be commanded that the petitioner be granted a hearing on the issues presented by his application for the writ.

Dated, San Francisco, California,
September 22, 1947.

Respectfully submitted,
WAYNE M. COLLINS,
Attorney for Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES

No. 111.—October Term, 1947.

Homer C. Price, Petitioner,
v.
James A. Johnston, Warden, United States Penitentiary, Alcatraz, California.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 24, 1948.]

Mr. Justice Murphy delivered the opinion of the Court.

The writ of *habeas corpus* has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty. But in recent years the increased use of this writ, especially in federal courts, has created many procedural problems which are not easy of solution. This case involves some of those problems. Because of the importance of the writ and the necessity that it not lose its effectiveness in a procedural morass, we have deemed it wise to deal with this case at length and to set forth fully and explicitly the answers to the matters at issue.

In 1938, petitioner was convicted in a federal district court in Michigan under a four-count indictment charging violations of the federal bank robbery statute.[1] He was sentenced to imprisonment for 65 years and was committed to the United States Penitentiary at Alcatraz,

[1] 12 U. S. C. §§ 588b and 588c. Petitioner was charged with having (1) entered a federally insured bank with intent to rob, (2) robbed the bank by putting an employee in fear; (3) jeopardized the lives of a bank employee and others by the use of a dangerous weapon, and (4) kidnapped a bank employee in the course of such offense. Petitioner was found guilty as charged.

California. His efforts to prosecute an appeal from his conviction proved futile.[2]

Since his confinement at Alcatraz, petitioner has made four separate applications for writs of *habeas corpus* in the United States District Court for the Northern District of California. The instant proceeding involves the fourth of these applications. Inasmuch as the problems in this case can best be understood in light of the issues raised in the earlier proceedings, it becomes necessary to examine the various applications in some detail.

1. The first application was prepared and filed in 1940 by petitioner, who is not a lawyer. He sought release mainly on the grounds that certain evidence used against him at the trial had been obtained in violation of the Fourth Amendment and that the trial judge had improperly refused to disqualify himself upon the filing of an affidavit of prejudice. It is important to note that this application did not allege that the conviction resulted from the prosecution's knowing use of false testimony. The District Court issued an order to show cause, a return was made, and the petitioner then filed a traverse in the form of a "Motion to overrule Respondent's return and issue writ." This motion likewise failed to aver the knowing use of false testimony. But it did call the court's attention to "two different statements" made at the trial by the prosecution's chief witness, Fred T. Donner, and to the "methods . . . used to obtain" this

[2] His petition to the Sixth Circuit Court of Appeals for a writ of mandamus to require the trial judge to enter a decision on his application for an appeal was denied because "no application for appeal is pending before respondent or in the United States District Court for the Eastern District of Michigan." *Price v. Moinet*, 116 F. 2d 500. His petition in this Court for a writ of certiorari was denied because filed out of time, 311 U. S. 703; rehearing denied, 311 U. S. 729. Petitioner acted as his own counsel in these unsuccessful maneuvers.

change in testimony.[3] There was no indication given as to what those "methods" were. Donner's testimony at the trial was attached as an exhibit, testimony which revealed that Donner had gone to the office of the District Attorney and talked to him and his assistant during the interval between the allegedly conflicting statements.[4]

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[3] Point V of petitioner's motion stated: "Because the respondent shows falsely on the affidavit by Assistant United States Attorney John W. Babcock, respondent's Exhibit 'A,' where he states that there was no determination of any one in said office of the United States Attorney to have him convicted falsely. Petitioner calls the attention of this Honorable Court to the testimony of transcript of record at page 35 Second part. Recross examination of the one and only witness that the government produced to testify that there had been a crime committed as charged in indictment #24629. Petitioner's Exhibit 'A,' testimony given by Fred T. Donner, and it will show just what methods was used to obtain two different statements from this witness."

[4] This testimony was brought out on recross examination of Donner by one of petitioner's attorneys. Part of this colloquy was as follows:

"Q. Witness, perhaps I misunderstood your testimony this morning. Did I understand you correctly to say that last night after you left here, you went up to the department of Justice, or the District Attorney's office, and you discussed your testimony?

"A. Yes, sir.

"Q. And whom did you discuss it with?

"A. With the District Attorney, and the assistant.

"Q. And after that discussion, you remembered some things that you have testified to this morning?

"A. I remembered them yesterday, but I just—I was nervous and forgot them.

"Q. Well, my recollection and yours perhaps do not agree on it, but the statements that you made yesterday were all true to the best of your recollection, were they not?

"A. Yes, sir.

"Q. And your conversations last night after you left the court didn't assist you in giving any testimony, did they?

"A. No, it did not, only that I had an opportunity, I wanted an

The District Court then appointed counsel for petitioner at his request. Several months later, when the matter came on for determination, the court entered an order denying the application for a writ of *habeas corpus* and dismissing the petition. No hearing was held, the order being entered solely on the basis of the pleadings. And no findings of fact or conclusions of law were made. Nor was an opinion written. Petitioner thereafter proceeded *pro se*. Among his various legal maneuvers, he moved for a rehearing. He stated, as grounds for the motion, that the court erred in refusing to allow him to appear and testify personally before entering the order and that the court-appointed attorney "blocked your petitioner from filing an amended petition to include additional points so that they could be reviewed on appeal." This motion was denied.

Petitioner prepared his own appeal to the Circuit Court of Appeals. Among the points upon which he stated he intended to rely was the claim that he had been denied "a fair and impartial trial" by Donner's change in testimony after talking with the District Attorney. But the Circuit Court of Appeals, in affirming the District Court's disposition of the *habeas corpus* petition, made no reference to this point; its opinion was devoted exclusively to the matters raised in the original petition. *Price v. Johnston*, 125 F. 2d 806.

Included in the numerous claims in his attempt to secure a writ of certiorari in this Court was the reiteration that Donner's change in testimony deprived him of a fair and impartial trial. According to his written argument, "if this was not perjured it was base contradictory evi-

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opportunity to bring out something that I hadn't said.

"Q. Did it refresh your recollection?

"A. No, it just—there were just some things I didn't tell in my story, that is all."

dence for after this witness had completed all his evidence he was then taken into the private chambers of the United States Attorney . . . and there was instructed as to what to say, for he came from said office and was recalled to the stand at this second setting he rebutted all his prior testimony. This must be either classed as a conspiracy forcing a witness to change his testimony either of which surely would not be giving the appellant the fair and impartial trial to which he is entitled." The Government's memorandum in opposition dealt with his contention in a footnote. It was there said that petitioner's claim "is refuted by the excerpt from the transcript of the proceedings at the trial introduced as part of petitioner's pleadings. . . . The witness did not rebut his prior testimony but merely supplemented it with a few more details and he affirmatively stated that his discussion with the prosecutor did not assist him in his subsequent testimony." This Court denied the petition for a writ of certiorari. *Price* v. *Johnston*, 316 U. S. 677; rehearing denied, 316 U. S. 712.

2. In 1942, several months after the foregoing action by this Court, petitioner prepared and filed in the District Court a second petition for a writ of *habeas corpus*. In this petition he sought release on the same grounds set forth in his first petition as well as on two principal additional grounds. The two new claims were that petitioner's counsel had been absent from the courtroom during an important part of the trial and that petitioner had not had counsel at the preliminary hearing before the United States Commissioner. The petition, as amended, contained no allegation that false testimony had been knowingly used at the trial; nor did it refer in any way to Donner's allegedly inconsistent testimony. Moreover, no mention of such matters was made by petitioner

in his testimony at the hearing on the writ of *habeas corpus*.[5]

The District Court, at the close of the hearing, discharged the writ. Its findings of fact and conclusions of law were subsequently entered and were silent as to any question relating to the knowing use of false testimony. The District Court's action was affirmed on appeal, the opinion of the Circuit Court of Appeals being devoted to the matters decided by the District Court. *Price* v. *Johnston*, 144 F. 2d 260. This Court then denied a petition for certiorari, a petition which presented no issues differing from those raised in the lower courts. *Price* v. *Johnston*, 323 U. S. 789; rehearing denied, 323 U. S. 819.

3. Petitioner's third petition for a writ of *habeas corpus* was denied by the District Court on August 22, 1945. This denial was based on the ground that the issues raised were known to petitioner when he filed the earlier petitions, making the third petition an abusive use of the writ of *habeas corpus*. *Price* v. *Johnston*, 61 F. Supp. 995.[6] Leave to appeal was denied. It is not evident, however, what the issues were that petitioner did raise in this proceeding.

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[5] The lawyer who had represented petitioner in connection with the first application withdrew and another was appointed in his place by the District Court to serve petitioner in the second proceeding. This lawyer filed an amended petition for the writ of *habeas corpus*. The writ issued, there was a hearing at which petitioner's counsel was present, a further amendment of the petition was allowed, and testimony was taken. Petitioner gave evidence on his own behalf at this hearing. In prosecuting his appeal from the District Court's action, petitioner once more acted *pro se*.

[6] The District Court's opinion, after briefly stating the background of the case, reads as follows:

"Petitioner alleges 'that the questions now raised was not raised in the prior petitions No. 23268–W and 10.671–R.' However, these matters were known to petitioner when he filed the petitions in 23268–W and 23721–R. If petitioner intended to rely on these matters he should have urged them in 23268–W. 'To reserve them for use in a later proceeding "was to make an abusive use of the

4. On January 2, 1946, petitioner filed his fourth application for a writ of *habeas corpus*. He alleged that he had been denied a fair and impartial trial in that, on the trial for bank robbery, the jury was confused by the presentation of evidence to show perjury before a notary public; that the court was not justified in imposing a general sentence on the four counts of the indictment, and that the fourth count did not allege an offense. After an order to show cause was issued, petitioner amended his petition to allege "That the government knowingly employed false testimony on the trial, to obtain the conviction."

The respondent warden, through the United States Attorney, thereupon filed his return to the order to show cause. This return did not deny the allegation that the Government knowingly employed false testimony at the trial. Nor did it question the sufficiency of the allegation or the absence of supporting facts. It simply incorporated by reference the entire record in the three prior *habeas corpus* proceedings and asked that the fourth petition be denied on the basis of the District Court's opinion denying the third application.[7] Petitioner's traverse stated that the earlier petitions did not contain some of the points presented in the fourth petition. It repeated the allegations in the original petition, though

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writ of habeas corpus." Swihart v. Johnston, 9 Cir., 1945, 150 F. 2d 721.

"Since upon the face of the petition petitioner is not entitled to the writ, Walker v. Johnston, 312 U. S. 275, the petition for writ of habeas corpus is denied."

[7] The Government's memorandum of points and authorities, filed with the return, merely quoted the District Court's opinion denying the third petition for a writ of *habeas corpus*, *Price* v. *Johnston*, 61 F. Supp. 995 (see footnote 6, *supra*). The memorandum then concluded: "Respondent, in reliance on the decision of Judge St. Sure and the authorities which he cites, respectfully urges that the petition for writ of habeas corpus should be denied and the order to show cause, heretofore issued, discharged."

it merely incorporated by reference the allegation of the amended petition that the prosecutor knowingly used false testimony.

The District Court denied the fourth petition without a hearing and without opinion. It is difficult to discover from such action the precise basis of the District Court's dismissal of the allegation in question. But because of the nature of the warden's return, we suspect that the court thought that the matter was known to petitioner at the time of filing the first petition and should have been urged at that time. There is nothing whatever to indicate that the dismissal stemmed from the court's belief that the allegation was insufficient on its face or that it was obviously without merit.

On appeal, a panel of the Ninth Circuit Court of Appeals ordered up the original files in petitioner's three previous applications and directed that petitioner be brought before the court for the argument of his appeal. After the argument, the submission of the cause was set aside and the case was assigned for hearing before the court *en banc*. Petitioner then moved the court *en banc* for an order directing his appearance for the reargument. This motion was denied on January 6, 1947. In its written opinion, a majority of the court held that circuit courts of appeals are without power to order the production of a prisoner for the argument of his appeal in person. One judge expressed the view that the court had such power, but concurred in the denial of the motion as a matter of discretion. Two judges dissented, stating that there was power to grant the requested relief; but they did not reach the question of the propriety of exercising that power in this case. 159 F. 2d 234.

The appeal was then considered on the merits on briefs filed by petitioner and respondent [8] and on oral argument

[8] The Government's brief in the Circuit Court of Appeals again was devoted solely to a quotation of the District Court's opinion

by an Assistant United States Attorney. Petitioner was unrepresented at the oral argument. On May 5, 1947, the order of the District Court denying the fourth petition without a hearing was affirmed, two judges dissenting in separate opinions. 161 F. 2d 705.

The majority opinion of the Circuit Court of Appeals pointed out that, by amending his fourth petition to allege "That the government knowingly employed false testimony on the trial, to obtain conviction," petitioner had interposed a wholly new ground for discharge. But the specific circumstances of this claim had not been developed in the District Court. The opinion accordingly treated the allegation as though it had incorporated petitioner's explanatory statement in his appellate brief that the United States Attorney, in the course of the trial, "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols, and described them, when he could not do so at first."

So construing the allegation, the court then said: "The records in these several proceedings disclose that throughout his trial appellant was represented by counsel of his own choosing. And since he was himself present at all times he could hardly have been unaware of the described incident or of its implications, nor does he make any such claim. On the face of his showing it is apparent he knew

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denying the third petition. See footnote 7, *supra*. It concluded with the following statement: "Appellee is in accord with the reasoning of Judge St. Sure and the authorities cited in his memorandum and order denying appellant's third application for a writ of habeas corpus, and hereby adopts them *in toto* as his argument on this appeal to sustain the Court below in its decision denying appellant's fourth application for a writ of habeas corpus in our case at bar."

as much about the misconduct at the time it is said to have occurred as he knows now. Yet no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions." 161 F. 2d at 706–707. And it was further stated that "Where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ." *Id.*, at 707. Since petitioner had given no valid excuse for failing to present earlier the allegation in question, the conclusion was reached that the District Court did not abuse its discretion in denying the fourth petition without a hearing. Reference was made in this respect to *Salinger* v. *Loisel*, 265 U. S. 224, and *Wong Doo* v. *United States*, 265 U. S. 239.

We issued a writ of certiorari to review the important issues thus raised in the two opinions of the Circuit Court of Appeals. And on petitioner's motion, we appointed a member of the bar of this Court to serve as his counsel before us.

I.

We hold that power is resident in a circuit court of appeals to command that a prisoner be brought before it so that he may argue his own appeal in a case involving his life or liberty. That power, which may be exercised at the sound discretion of the court, grows out of the portion of § 262 of the Judicial Code, 28 U. S. C. § 377, which provides that "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

An order requiring the presence of a prisoner before a circuit court of appeals to argue his own appeal is one in

the nature of a writ of *habeas corpus*. As such, it clearly falls within the scope of § 262. Basic to the power of a circuit court of appeals to issue a writ of *habeas corpus* under that section, of course, is the pendency of a proceeding of an appellate nature to which the contemplated writ is auxiliary. *Whitney* v. *Dick*, 202 U. S. 132. The writ cannot be issued by that court as an independent and original proceeding; it can only issue where it may be necessary to the complete exercise of an appellate jurisdiction already existing. Since the occasion for demanding the presence of a prisoner at an oral argument would arise only where there was an appeal already pending before the court, a writ compelling his presence satisfies this basic requirement of § 262.

Moreover, a writ of *habeas corpus* of this nature can on occasion be "necessary" for the exercise of appellate jurisdiction so as to be authorized by § 262. We have refused to interpret that section to mean that a circuit court of appeals can issue a *habeas corpus* writ only if "necessary" in the sense that the court could not otherwise physically discharge its appellate duties. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 273. Rather, § 262 has been read so that the writ may be issued where its use is calculated, in the sound judgment of the circuit court of appeals, to achieve the ends of justice entrusted to it. In other words, the writ is available in those exceptional cases "where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice." *Id.*, at 274.

Exceptional situations may arise where a circuit court of appeals might fairly conclude that oral argument by a prisoner in person is "reasonably necessary in the interest of justice." True, an appeal can always be submitted on written briefs. But oral argument, while not

indispensable, is frequently if not usually desired by the parties. And there are occasions when a court deems it essential that oral argument be had; indeed, a court order or request to that effect may be necessary where the parties have previously indicated a willingness to forego the privilege. In such situations where oral argument is slated to take place, fairness and orderly appellate procedure demand that both parties be accorded an equal opportunity to participate in the argument either through counsel or in person. The difficulty, of course, arises when one of the parties is a prisoner who has no lawyer and who desires that none be appointed to represent him, being of the belief that the case is of such a nature that only he himself can adequately discuss the facts and issues. Since ordinarily the court cannot designate counsel for the prisoner without his consent, an arrangement that is made for his presence and participation at the oral argument can be said to be "reasonably necessary in the interest of justice." Otherwise the court loses the benefits of listening to his contentions, hearing only the arguments of government counsel. Conceivably, the prisoner's case might be unduly prejudiced by such a one-sided debate. That the argument orally advanced by the prisoner may in fact be less than enlightening to the court does not detract from the fairness or the justness of giving him the opportunity to appear and argue. Thus if a circuit court of appeals is satisfied in other respects that the prisoner should be produced at the argument, a writ designed to effectuate that production is plainly "necessary" within the contemplation of § 262.

It remains to be seen whether a writ of *habeas corpus* for the purpose under consideration is "agreeable to the usages and principles of law," as that phrase is used in § 262. At common law there were several variants of the writ of *habeas corpus*. See 3 Blackstone's Commen-

taries 129–132; *Ex parte Bollman*, 4 Cranch 75, 97–98.[9] None of them, however, seems to have been devised for the particular purpose of producing a prisoner to argue his own appeal. Nor does it appear that the courts of England have used or developed the *habeas corpus* writ for this purpose.[10]

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[9] Blackstone describes the following common law versions of the *habeas corpus* writ:

(1) *Habeas corpus ad respondendum*. Issued "when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above."

(2) *Habeas corpus ad satisfaciendum*. Issued "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution."

(3) *Habeas corpus ad prosquendum, testificandum, deliberandum*, etc. Issued "when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

(4) *Habeas corpus ad faciendum et recipiendum*. This "issues out of any of the courts of Westminster hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated an *habeas corpus cum causa*,) to do and receive whatsoever the king's court shall consider in that behalf."

(5) *Habeas corpus ad subjiciendum*. The "great and efficacious writ," which is "directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf."

Chief Justice Marshall examines the first four of these writs in their relation to the American judicial system in *Ex parte Bollman*, 4 Cranch 75, 97–98.

[10] The courts of England have long considered themselves powerless to issue a *habeas corpus* writ to enable a prisoner to defend himself in another proceeding or to argue motions in the trial court. *Benns*

However, we do not conceive that a circuit court of appeals, in issuing a writ of *habeas corpus* under § 262 of the Judicial Code, is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of "law," a term which is unlimited by the common law or the English law. And since "law" is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the *habeas corpus* writ authorized by § 262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short, we do not read § 262 as an ossification of the practice and procedure of more than a century and a half ago. Rather it is a legislatively approved source of procedural instruments designed to achieve "the rational ends of law." *Adams* v. *United States ex rel. McCann, supra,* 273.

We accordingly look to the usages and principles which have attached themselves to the writ of *habeas corpus* down through the years to the present time. The historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause. The most important result of such usage has been to afford a swift and imperative remedy in all cases of illegal restraint upon personal

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v. *Mosley,* 2 C. B. (N. S.) 116; *Weldon* v. *Neal,* 15 Q. B. D. 471. See also *Attorney General* v. *Hunt,* 9 Price 147; *Ford* v. *Nassau,* 9 M. & W. 793; *Rex* v. *Parkyns,* 3 B. & Ald. 679; *Attorney General* v. *Cleave,* 2 Dowl. P. C. 668; *Ex parte Cobbett,* 3 H. & N. 155; *Clark* v. *Smith,* 3 C. B. 982. But the specific problem of whether a prisoner can be produced to argue in person his own appeal under circumstances like those present in the instant case does not appear to have a precise answer in English law.

liberty. With that usage, a writ for the purpose under consideration is entirely agreeable and consistent. To order the production of a prisoner before an appellate court to argue his own appeal in a case in which he alleges that he is illegally imprisoned is to perform an act which is intimately and necessarily related to the presentation of the merits of the prisoner's complaint, a presentation which is essential if relief from the allegedly illegal imprisonment is to be secured. Such production, as we have seen, may in some circumstances be essential to the proper disposition of the case on appeal. Where that is the case, a writ in the nature of *habeas corpus* to achieve that production is agreeable to the usages of law.

Moreover, the principle has developed that the writ of *habeas corpus* should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ. The fluidity of the writ is especially desirable in the setting of a statute where Congress has given circuit courts of appeals the power to issue the writ in aid of their appellate jurisdiction wherever "reasonably necessary in the interest of justice." The ordinary forms and purposes of the writ may often have little relation to the necessities of the appellate jurisdiction of those courts. Justice may on occasion require the use of a variation or a modification of an established writ. It thus becomes essential not to limit appellate courts to the ordinary forms and purposes of legal process. Congress has said as much by the very breadth of its language in § 262. It follows that we should not write in limitations which Congress did not see fit to make.

Formulation of the limitations of § 262 which do exist must await the necessities of appellate jurisdiction in particular cases. It is enough for the present to note that where those necessities are such as to require the presence

of a prisoner to argue his own appeal, the issuance of a writ of *habeas corpus* for that purpose is "agreeable to the usages and principles of law" so as to be sanctioned by § 262. Only in that way can we give substance in this case to our previous statement that "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Adams* v. *United States ex rel. McCann, supra*, 274.

We therefore conclude that circuit courts of appeals do have the power under § 262 of the Judicial Code to issue an order in the nature of a writ of *habeas corpus* commanding that a prisoner be brought to the courtroom to argue his own appeal. That power has heretofore been assumed. *Schwab* v. *Berggren*, 143 U. S. 442, 449; and see *Goldsmith* v. *Sanford*, 132 F. 2d 126, 127; *Donnelly* v. *State*, 26 N. J. Law 463, 472, affirmed, 26 N. J. Law 601. We now translate that assumption into an explicit holding.

In so deciding, however, we emphasize that the power of a circuit court of appeals to issue such a writ is discretionary. And this discretion is to be exercised with the best interests of both the prisoner and the government in mind. If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily from the confines of the prison,[11] that he is capable of conducting an intelligent

[11] The Circuit Court of Appeals below felt that the production of prisoners to argue their own appeals might lead to "the widespread abuse of the writ . . . , not to mention the items of fruitless burden and expense. To the legitimate hope of release by legal means would be added inducements not so legitimate; for temporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls." 159 F. 2d at 237.

In this connection, the *amicus curiae* brief of the American Civil Liberties Union of Northern California makes the following statement: "Prisoners leave Alcatraz Island in chains and in the custody

and responsible argument, and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ. But if any of those factors were found to be negative, the court might well decline to order the prisoner to be produced. Section 262, in other words, does not justify an indiscriminate opening of the prison gates to allow all those who so desire to argue their own appeals.

The discretionary nature of the power in question grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. *Schwab* v. *Berggren*, *supra*. The absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution,[12] see *Hopt* v. *Utah*, 110 U. S. 574, and *Snyder* v. *Massachusetts*, 291 U. S. 97, and to his recognized privilege of conducting his own defense at the trial. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by § 272 of the Judicial Code, 28 U. S. C. § 394, to parties in all the courts of the United States to "plead and manage their own causes personally." To the extent that this

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of armed guards and are brought by boat to San Francisco where they are transferred to the marshal's van. Soon thereafter they are confined behind bars in his jail in the Post Office Building until they are conducted into the courtroom where they are manacled and in chains and in the immediate custody of armed guards during the hearing. Sightseeing is conspicuous by its absence. The trip is devoid of allure for the prisoner, if observed at all by private persons, is seen in his fettered condition which causes as much embarrassment to him as the hopelessness of his prospects for success at his hearing."

[12] But see *Bell* v. *United States*, 129 F. 2d 290; *Barber* v. *United States*, 142 F. 2d 805.

section permits parties to conduct their own oral arguments before appellate courts, it must be modified in its application to prisoners. Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates.

A prisoner's right to participate in oral argument on appeal is accordingly to be determined by the exercise of the discretionary power of the circuit court of appeals under § 262. The court below erred in holding that no such power existed. But since the case must go back to the District Court for further proceedings, it is unnecessary here to remand the case to the Circuit Court of Appeals to exercise the discretionary power which rightfully belongs to it.

II.

We hold that petitioner's fourth petition for a writ of *habeas corpus*, alleging the knowing use of false testimony to obtain his conviction, was improperly dismissed by the District Court.

The Government argues before us that the allegation in question, as presented to the District Court, is a mere allegation of law unsupported by reference to any specific facts. As such, the allegation is said to be fatally deficient and to warrant summary denial. Reference is made in this respect to *Cuddy, Petitioner*, 131 U. S. 280, 286; *Kohl* v. *Lehlback*, 160 U. S. 293, 299; *United States* v. *Ju Toy*, 198 U. S. 253, 261; *Collins* v. *McDonald*, 258 U. S. 416, 420–421; *Hodge* v. *Huff*, 140 F. 2d 686, 688; and *Long* v. *Benson*, 140 F. 2d 195, 196.

But this proposition was apparently not presented to or passed upon by the District Court; nor was it determined by the Circuit Court of Appeals. The sole complaint made by the Government in the lower courts, and the main one raised before us, relates to petitioner's

alleged abuse of the writ of *habeas corpus*. A consideration of that factor is preliminary as well as collateral to a decision as to the sufficiency or merits of the allegation itself. We accordingly address ourselves solely to the alleged abuse of the writ, leaving the Government free to press its objections to the adequacy of the allegation after the proceedings are renewed before the District Court.

The Circuit Court of Appeals, as we have noted, treated the bare allegation of the knowing use of false testimony as having incorporated the explanatory statement in petitioner's appellate brief. Whether such an expanded allegation states a sufficiently specific violation of due process within the meaning of *Mooney* v. *Holohan*, 294 U. S. 103, is a question which we need not now answer. Nor is it necessary here to decide the propriety of treating a statement in an appellate brief as an amplification of an allegation in the trial court, a practice to which the Government makes objection.

But in dealing with the alleged abuse of the writ of *habeas corpus*, we find it undenied that the explanatory statement illuminates the allegation made in the District Court. The statement makes clear the incident to which petitioner had reference when he alleged the knowing use of false testimony. In other words, the essence of petitioner's charge is that the prosecution brought undue pressure to bear on the Government's chief witness, Donner, to change his testimony and that this altered testimony was knowingly used to obtain petitioner's conviction. Cf. *Pyle* v. *Kansas*, 317 U. S. 213, 215–216. The issue now is whether petitioner has so abused the writ of *habeas corpus* as to bar a consideration of this allegation, whether it be general or specific in form or whether it be supported or unsupported by factual references.

From the facts which we have previously detailed it is evident that this allegation was not properly raised prior

to the amendment of the fourth petition. None of the three prior petitions had made this point. In the first proceeding, it is true, petitioner's traverse to the warden's return called the court's attention to the differing statements allegedly made by Donner and claimed that certain undefined "methods" had been used to obtain the change in testimony. Petitioner was apparently trying to raise the due process issue formulated in *Mooney* v. *Holohan*, *supra*. But his effort was without success. A mere claim that a witness gave inconsistent testimony is not enough to charge the prosecution's knowing use of false testimony; it may well be that the witness' subsequent statements were true, in which event the claim of inconsistency is not a constitutional objection. Since this due process issue was not properly raised, we cannot assume that the District Court's action in dismissing the first petition on the pleadings was a determination against petitioner on the merits of the issue.

Further elaboration of the Donner incident was made by petitioner in the course of seeking review of the District Court's action on the first petition. Both in the Circuit Court of Appeals and in this Court he claimed that he had been denied a fair and impartial trial by Donner's alleged shift in testimony; and in this Court he stated that there had been a conspiracy to force Donner to change his story. It is noteworthy that the Government did not see fit to deny or controvert petitioner's claim until the case reached this Court. We need not decide whether the due process issue was properly raised in the review proceedings, inasmuch as petitioner's failure to make a proper allegation in that respect in the District Court foreclosed any determination of the matter. And as we have noted, the second and third petitions for *habeas corpus* were completely silent as to this due process issue.

There has thus been no proper occasion prior to the fourth proceeding for a hearing and determination by the District Court as to the allegation that the prosecution knowingly used false testimony to obtain a conviction. That fact renders inapplicable *Salinger* v. *Loisel*, 265 U. S. 224, upon which reliance was placed by the Circuit Court of Appeals. It was there held that, while *habeas corpus* proceedings are free from the *res judicata* principle, a prior refusal to discharge the prisoner is not without bearing or weight when a later *habeas corpus* application raising the same issues is considered. But here the three prior applications did not raise the issue now under consideration and the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition. *Waley* v. *Johnston*, 316 U. S. 101.

Likewise irrelevant to the instant proceeding is *Wong Doo* v. *United States*, 265 U. S. 239. In that case, the petitioner set forth two grounds for discharge in his first petition. At the hearing, he offered no proof in support of the second ground. The petition was dismissed on the theory that the first ground was not good in law. A subsequent *habeas corpus* petition relied entirely on the second ground alleged in the first petition. This Court held that the petitioner had had full opportunity to offer proof as to the second point at the hearing on the first petition, proof which was accessible at all times. If he was intending to rely on that ground, good faith required that he produce his proof at the first hearing. "To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered." 265 U. S. at 241.

The *Wong Doo* case thus involved a situation where one has properly raised an issue in an earlier petition, has received a full opportunity at a hearing to present evidence on the point, and has refused to avail oneself of that opportunity. The distinguishing features in the instant case are obvious.

There is one factor in this case that might be thought to justify the dismissal of the fourth petition as an abusive use of the *habeas corpus* writ. That factor is that petitioner had prior knowledge of the Donner incident which forms the basis, at least in part, of the due process allegation now being made. The record in the first proceeding shows that petitioner's own lawyer elicited the information from Donner that he had talked with the prosecuting lawyers during the interlude between the allegedly conflicting statements. And petitioner made reference to that information during the course of the first *habeas corpus* proceeding in the manner heretofore described. Petitioner now utilizes that same information in alleging that the prosecution made a knowing use of false testimony.

In the first place, however, we cannot assume that petitioner has acquired no new or additional information since the time of the trial or the first *habeas corpus* proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys. As Judge Denman stated in his dissenting opinion below, 161 F. 2d at 708–709: "The gravamen of the misconduct charged is not the fact that the witness changed his testimony but that the prosecuting attorney knowingly caused the witness to give the false testimony. All the accused and his attorney knew at the trial was that the single prosecuting witness changed his testimony. Obviously this in itself does not warrant a charge of fraud. That it was fraudulently done by persuasion of the prosecuting attorney

could only have been learned after conviction and after the convicted man was in the penitentiary."

Whether petitioner does or does not have any new information is a matter unrevealed by anything before us or before the Circuit Court of Appeals. It is a matter which should be determined in the first instance by the District Court. And it is one on which petitioner is entitled to be heard either at a hearing or through an amendment or elaboration of his pleadings. Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. Cf. *Kennedy* v. *Silas Mason Co.*, 334 U. S. —.

In the second place, even if it is found that petitioner did have prior knowledge of all the facts concerning the allegation in question, it does not necessarily follow that the fourth petition should be dismissed without further opportunity to amend the pleadings or without holding a hearing. If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

Moreover, we do not believe that the burden was on the petitioner of affirmatively alleging in the first instance that he had acquired new information or that he had adequate reasons for not raising sooner the issue of the knowing use of false testimony. It was enough if he presented an allegation and supporting facts which, if borne out by proof, would entitle him to relief. Pris-

oners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in *habeas corpus* proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession. Especially is this true in a case like this where the imposition of those standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition. Cf. *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Pyle* v. *Kansas*, *supra*, 216; *Tomkins* v. *Missouri*, 323 U. S. 485, 487; *Rice* v. *Olson*, 324 U. S. 786, 791–792.

And so if the Government chooses not to deny the allegation or to question its sufficiency and desires instead to claim that the prisoner has abused the writ of *habeas corpus*, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ. If the answer is inadequate, the court may dismiss the petition without further proceedings. But if there is a substantial conflict, a hearing may be necessary to determine the actual facts. Appropriate findings and conclusions of law can then be made. In this way an adequate record may be established so that appellate courts can determine the precise basis of the district court's action, which is often shrouded in ambiguity where a petition is dismissed without an expressed reason. And the prisoner is given a fairer opportunity to meet all possible objections to the filing of his petition.

It is obvious that the procedure followed in the District Court in the instant proceeding precluded a proper devel-

opment of the issue of the allegedly abusive use of the *habeas corpus* writ. The Government's response to the order to show cause was too indefinite and vague to give petitioner a fair opportunity to meet this important issue. Merely quoting the court's opinion in the third *habeas corpus* proceeding was not enough to require petitioner to explain his reasons for failing to present earlier his allegation as to the knowing use of false testimony. And the court either failed or was unable to delineate the issue by making specific findings and conclusions of law or by explaining its view of the matter in a written opinion.

We are not unaware of the many problems caused by the numerous and successive *habeas corpus* petitions filed by prisoners.[13] But the answer is not to be found in repeated denials of petitions without leave to amend or without the prisoners having an opportunity to defend against their alleged abuses of the writ. That only encourages the filing of more futile petitions. The very least that can and should be done is to make *habeas corpus* proceedings in district courts more meaningful and decisive, making clear just what issues are determined and for what reasons.

To that end, we reverse the judgment below and remand the instant case to the District Court for further proceedings consistent with this opinion. We do not hold that the District Court, on remand, must grant the fourth *habeas corpus* petition if it is unsupported and unsubstantiated; nor do we hold that a hearing must now be held on the merits of the allegation in question. Rather the case must be developed further in light of the principles discussed herein. The Government is free to amend its return to bring into focus whatever abuse of the

[13] See discussions in *Dorsey* v. *Gill*, 148 F. 2d 857; Goodman, "Use and Abuse of the Writ of Habeas Corpus," 7 F. R. D. 313; Note, 61 Harv. L. Rev. 657.

writ of *habeas corpus* it thinks petitioner has committed. And the petitioner is free to answer such charge as may be made in that respect, the burden being on him to show that he is entitled at this late date to make the allegation as to the knowing use of false testimony. The District Court may then dispose of the matter on the pleadings or order that a hearing be had to develop the facts. If the court eventually determines that petitioner has not abused the writ, the allegation of the knowing use of false testimony should be decided on its merits. But in any event the court should make explicit its determination of the preliminary problem of the abusive use of the writ.

Reversed and remanded.

as to its sufficiency and

SUPREME COURT OF THE UNITED STATES

No. 111.—October Term, 1947.

Homer C. Price, Petitioner,
v.
James A. Johnston, Warden, United States Penitentiary, Alcatraz, California.

On Writ of Certiorari to The United States Circuit Court of Appeals for the Ninth Circuit.

[May 24, 1948.]

Mr. Justice Frankfurter, dissenting.

I agree with the views of Mr. Justice Jackson that, in the light of all the long-drawn-out prior proceedings, the two lower courts justifiably found the fourth petition for *habeas corpus* in this case without merit on its face. It is not too much to ask the petitioner to state, however informally, that his fourth petition is based on newly discovered matter, or, in any event, on a claim that he could not fairly have been asked to bring to the court's attention in his three prior petitions. Such a requirement certainly does not narrow the broad protection which the writ of *habeas corpus* serves. I also agree with his general attitude against a prisoner being brought from Alcatraz—or any other federal prison—to argue his own case on appeal. My difference with him is that I would not bolt the door to such an undesirable practice, as a matter of law, but merely leave it as a rigorous rule of practice. The power to depart from this rule ought not to be wholly foreclosed, even though opportunity for its exercise is left for contingencies not easily foreseeable.

The office of the writ of *habeas corpus* precludes definitive formulation of its limitations precisely because it is the prerogative writ available for vindicating liberties. See *Sunal* v. *Lodge*, 332 U. S. 174, 184, 187. Therefore, I would not preclude the use of the writ to bring a convict

before a circuit court of appeals where circumstances in the interests of justice make his presence compelling. See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 272–75. It is a very different thing to judge the use of the writ for the purpose of having an incarcerated petitioner argue his own case on appeal by the ordinary standards of judicial discretion. To acknowledge such power in the circuit courts of appeals implies too broad an authority, in that the abuse of its exercise in granting the writ is too narrow a basis for review. A general rule should preclude the use of the writ for the purpose of taking a prisoner out of confinement merely to argue his own case on appeal from dismissal of a petition for *habeas corpus* after conviction. Every legitimate right of such a prisoner can be safeguarded by means much more consonant with the fair and seemly and wise administration of justice.

THE CHIEF JUSTICE and MR. JUSTICE REED join in this dissent.

SUPREME COURT OF THE UNITED STATES

No. 111.—October Term, 1947.

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[May 24, 1948.]

Mr. Justice Jackson, dissenting.

I cannot agree that the District Court erred in dismissing this unsupported and unsubstantiated fourth *habeas corpus* petition, whether his action in so doing was based on its obvious lack of merit or on the prisoner's abuse of the writ. Nor can I agree that appearance of a prisoner merely to argue his case is "necessary for the exercise" of the jurisdiction of the Court of Appeals and "agreeable to the usages and principles of law" as is required by § 262 of the Judicial Code, 28 U. S. C. § 377.

This case is typical of many based on repeated *habeas corpus* petitions by the same prisoner.[1] This petitioner is serving a long term for armed bank robbery. Confine-

[1] Petitioner was convicted of armed bank robbery in April, 1938. After that date, and prior to the filing of this current *habeas corpus* petition, he took the following steps seeking his liberty:

1. In 1940, petitioned the Court of Appeals for mandamus to force the trial judge to act on an application for appeal; that court found no such application was then pending and denied the petition; this Court denied certiorari, 311 U. S. 703, and a rehearing 311 U. S. 729.

2. In 1940, filed an application for *habeas corpus*. After argument by court-appointed counsel, the application was dismissed. The Court of Appeals affirmed, 125 F. 2d 806; this Court denied certiorari 316 U. S. 677, and denied rehearing 316 U. S. 712, the latter decision being announced June 1, 1942.

3. On September 24, 1942, filed another *habeas corpus* petition. After hearing, participated in by court-appointed counsel, the petition

ment is neither enjoyable nor profitable. And it is safe to assume that it neither gives rise to new scruples nor magnifies old ones which would handicap petitioner's preparation of one *habeas corpus* application after another. If the trial court rules one set of allegations deficient, concoction of another set may bring success. Under this decision, failure to allege the most obvious grounds in earlier applications, or to support them with facts in a later petition, is not fatal. The number of times the Government must re-try the case depends only on the prisoner's ingenuity, industry and imagination. This prisoner, in his fourth petition in eight years, has now gotten around to charging that, at his trial in 1938, the Government knowingly employed false testimony to obtain the conviction. This issue substantially involves a retrial of the original conviction after more than ten years have passed by, memories are blurred, evidence is lost, and parties dispersed. The petition is unaccompanied by any particulars supporting this most serious charge against the court and responsible officers of the law. The prisoner, of course, has nothing to lose in any event. Perjury has few terrors for a man already sentenced to 65 years' imprisonment for a crime of violence. Even such honor as exists among thieves is not too precious to be sacrificed for a chance at liberty. Consequently, his varying allegations can run the gamut of all those perpetuated in the pages of the United States reports.

The Court now holds that such irresponsible, general, unsupported and belated accusations must be tried out; further, the District Judge erred in that he did not request the perennial petitioner to fill in details, the absence of

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was dismissed. The Court of appeals affirmed, 144 F. 2d 260; this Court denied certiorari, 323 U. S. 789, and denied rehearing, 323 U. S. 819, the latter decision being announced on January 29, 1945.

4. Prior to August 22, 1945, filed third *habeas corpus* petition, which was denied on that date, 61 F. Supp. 995.

The current petition was filed in January, 1946.

which, under established rules, justified his dismissal of the petition actually filed. I think that the Government should not be required to go to trial (or rather, retrial) on a case of this kind, unless the petitioner, without prompting or solicitation by the court, alleges with particularity conduct which would be sufficient, if proved, to entitle him to release. If he does not have such facts, he is doomed ultimately to fail; if he does have them, he should not be permitted to force the court and the Government into further litigation until he has disclosed them. And certainly it is not too much to require that on a fourth petition, eight years after conviction, the petitioner must also set forth facts which will excuse his failure to raise his question in earlier petitions instead of at a period so remote from his trial.

Moreover, if any one of petitioner's applications and accompanying facts convince the trial judge that a hearing on the merits is justified, the prisoner's presence in the trial court, to testify, may fairly be said to be necessary. The procedure for bringing him before that court to give his evidence is of ancient origin. But it is another and quite different matter to say that a layman's presence, solely to take part in a legal argument on a settled record, is necessary for the exercise of the jurisdiction of the appellate court. The only suggested authority for so ordering a jailer to fetch a prisoner to argue his own appeal is § 262 of the Judicial Code, 28 U. S. C. § 377, which provides that "the Supreme Court, the circuit courts of appeal and the district courts shall have power to issue all writs not specifically provided for by statute," and if the statute stopped here, the Court might have some basis for its action. But the section adds, "'which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Even if the Court of Appeals, or this Court, believed that the former should have the power to summon pris-

oners for argument of their appeals, that is not the issue. The issue is, can the requirements of the statute be met? Is the prisoner's presence merely to argue his case "necessary for the exercise" of the appellate court's jurisdiction? I think it is far-fetched to so hold.[1] Such courts may, and usually do, appoint counsel for a prisoner who cannot obtain one for himself. If there is more that the defendant himself wants to present, it can always be done in writing. Many cases are decided in appellate courts solely on written briefs. But the Court fears that some prisoners like this one may not only refuse counsel but also wish not to rest on a written brief. Under the statute, however, it is not the convenience or the egotism of the prisoner that confers power to grant a writ—it is the *necessity* of the writ for the exercise of the Court's jurisdiction. It is difficult for me to believe that prisoners, whom the Court so often forgives for violating all rules of pleading and procedure on the ground of lay ignorance, can be a necessary source of light and leading to an appellate court. The absence of such a necessity is, I suppose, the reason why no such writ has been known to the law until today's revelation, and why the statute does not allow it. But the Court

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[1] It is a very different thing to find the presence of the prisoner "necessary" under such circumstances as in *Adams* v. *U. S., ex rel. McCann*, 317 U. S. 269, 274, where this Court explained the necessity as follows:

"The circumstances that moved the court below to the exercise of its jurisdiction were the peculiar difficulties involved in preparing a bill of exceptions. The stenographic minutes had never been typed. The relator claimed that he was without funds. Since he was unable to raise the bail fixed by the trial judge, he had been in custody since sentence and therefore had no opportunity to prepare a bill of exceptions. The court doubted 'whether any [bill] can ever be made up on which the appeal can be heard . . . . In the particular circumstances of the case at bar, it seems to us that the writ is 'necessary to the complete exercise' of our appellate jurisdiction because . . . there is a danger that it cannot be otherwise exercised at all and a certainty that it must in any event be a good deal hampered.'"

by this decision makes it proper for any prisoner, whose appeal from either conviction or denial of any one of his multitudinous petitions for *habeas corpus* is before the Court of Appeals, to insist that he be transported to that court to argue the case and to demand a ruling by the court on that issue as well as on the merits. This seems to open the gate to new and fruitless litigation.

Admittedly, the statute's second requirement, *viz:* that the writ be "agreeable to the usages and principles of the law," cannot be met. It is apparent that the latter clause is a limitation on the earlier sweeping grant of power. *Ex parte Bollman and Swartwout*, 4 Cranch 75, 99. The Circuit Courts of Appeal are statutory courts and must look to a statutory basis for any jurisdiction they exercise. But in this case the Court is authorizing a complete overriding of the limitation Congress has seen fit to impose. The Court's opinion points out that employment of the writ of *habeas corpus* for this purpose has never been a usage or principle of the common law. No statutory or decisional [3] basis for such a usage or

[3] The Court says that it "translates" the "assumption," found in one decision of this Court, one of a Court of Appeals, and one of a state court, into a specific holding that the Circuit Courts of Appeals do have this power. The *dictum* in *Schwab* v. *Berggren*, 143 U. S. 442, 449 is merely this: ". . . But neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court whose only function is to determine whether, in the transcript submitted to them, there appears any error of law to the prejudice of the accused; especially, where, as in this case, he had counsel to represent him in the court of review. We do not mean to say that the appellate court may not, under some circumstances, require his personal presence; but only that his presence is not essential to its jurisdiction to proceed with the case." In *Goldsmith* v. *Sanford*, 132 F. 2d 126, cert. den. 318 U. S. 762, rehearing denied 318 U. S. 799, the Court said: ". . . We know of no precedent for taking a prisoner from the penitentiary that he might be present to argue in person his appeal from the adverse judgment on habeas corpus . . . If there be power to order the removal which was requested, discretion was well exercised in refusing it." In *Donnelly*

principle is cited. Yet, ignoring the limitations of this very statute, the Court concludes that the writ can just be issued anyway. I cannot subscribe to this sort of statutory "construction."

This is one of a line of cases by which there is being put into the hands of the convict population of the country new and unprecedented opportunities to re-try their cases, or to try the prosecuting attorney or their own counsel, and keep the Government and the courts litigating their cases until their sentences expire or one of their myriad claims strikes a responsive chord or the prisoner make the best of an increased opportunity to escape. I think this Court, by inflating the great and beneficent writ of liberty beyond a sound basis, is bringing about its eventual depreciation.[4]

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v. *State*, 26 N. J. Law 463, affirmed, 26 N. J. Law 601, which could hardly be even persuasive here, the Court held that the prisoner's presence was not necessary for jurisdiction, nor was it required as a technical necessity or a matter of right.

The "translation" of these "assumptions" into a holding involves, under this statute, a decision that these three isolated statements represents the "usages and principles of law." Those terms have been in the statute since the original Judiciary Act of 1789, and the Court admits there was no such usage or principle prior to that time. These three later cases are therefore the only shadow of a basis for holding that a writ such as the Court now directs meets the requirements of the statute. To consider such unauthoritative sources as a precedent on this point would be bad enough—but to enlarge them to a usage or principle of law is even less warranted. Reliance on these isolated pronouncements, which, either individually or collectively, are far from being authority on this point, seems close to creating precedents out of thin air.

[4] Such depreciation has already set in. See Goodman, "Use and Abuse of the Writ of Habeas Corpus," 7 F. R. D. 313, stating, at page 315, that from June 1937 to June 1947 6 prisoners in Alcatraz filed a total of 68 petitions, while 57 others filed 183 petitions. See also *Dorsey* v. *Gill*, 148 F. 2d 857, stating (862–863) that in one five-year period one prisoner filed 50 petitions in the District Court for the District of Columbia; four others filed 27, 24, 22 and 20, respectively; and 119 prisoners filed 597 petitions, an average of 5 each.